

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

APRIL TERM, 1936.

No. 6798

32

WILLIAM H. WALKER, ELIZABETH G. HAILER,
AND CHARLES W. HAILER, ET AL., APPELLANTS,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN AND
DANIEL I. SULTAN, COMMISSIONERS OF THE
DISTRICT OF COLUMBIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED JULY 27, 1936

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United States Court of Appeals for the
District of Columbia

APRIL TERM, 1936

No. 6798

WILLIAM H. WALKER, ELIZABETH G. HAILER,
AND CHARLES W. HAILER, WILLIAM K. WIM-
SATT, HERMAN M. GRIMES AND ROBERT C.
WIMSATT, TRUSTEES UNDER THE WILL OF
WILLIAM A. WIMSATT, DECEASED, APPEL-
LANTS,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN AND
DANIEL I. SULTAN, COMMISSIONERS OF THE
DISTRICT OF COLUMBIA, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

a. District Court of the United States for the
District of Columbia.

District Court 2352

IN RE:

Condemnation of land for the Michigan Avenue viaduct and approaches, including the widening of 10th Street at Michigan Avenue, Northeast, and the proposed reservation at the intersection of Michigan Avenue and 10th Street, Northeast, in the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

1 *Petition*

Filed July 8 1935

In the Supreme Court of the District of Columbia
Holding a District Court

District Court 2352

IN RE:

Condemnation of land for the Michigan Avenue viaduct and approaches, including the widening of 10th Street at Michigan Avenue, Northeast, and the proposed reservation at the intersection of Michigan Avenue and 10th Street, Northeast, in the District of Columbia.

The Petitioners, Melvin C. Hazen, George E. Allen and Daniel I. Sultan, Commissioners of the District of Columbia, respectfully represent:

1. That they are the Commissioners of the District of Columbia and file this petition for the purpose of acquiring land for the Michigan Avenue viaduct and approaches

thereto, including the widening of 10th Street at Michigan Avenue, Northeast, and the proposed reservation at the intersection of Michigan Avenue and 10th Street, Northeast, in the District of Columbia, for the elimination of the present crossing at grade of Michigan Avenue and the tracks and right of way of the Baltimore & Ohio Railroad Company, as authorized by the Act of Congress approved February 12, 1931 entitled "An Act to amend the Act entitled 'An Act to provide for the elimination of the Michigan Avenue Grade Crossing in the District of Columbia and for other purposes' ", approved March 3, 1927, which Act, as amended, in part provides:

"The Commissioners are further authorized to acquire out of the appropriations herein authorized the necessary land to carry out the provisions of this Act, by purchase, at such price or prices as in their judgment they may deem reasonable and fair, or, in the discretion of the Commissioners by condemnation in accordance with Chapter XV of the Code of Law of the District of Columbia as amended."

2 2. That by the provisions of Chapter XV of the Code of Law for the District of Columbia, as amended by the Act of Congress approved March 1, 1929, entitled "An Act to amend Chapter XV of the Code of Law for the District of Columbia and for other purposes," the Commissioners of the District of Columbia are authorized, whenever land therein is needed for the sites for school-houses, fire or police stations, or for any other municipal use authorized by Congress, and the same cannot be acquired by purchase from the owners thereof at a price satisfactory to the officers of the Government, authorized to negotiate for the same, to make application to the Supreme Court of the District of Columbia for the ascertainment of the value, and the condemnation of the land for the purpose for which it is needed.

3. That in the judgment of your petitioners it is necessary to acquire the pieces and parcels of land described herein and situated in the District of Columbia for the viaduct and approaches thereto.

4. That a map or plan showing the land so needed and the structures and buildings on said land is filed herewith, as part hereof, marked "Exhibit, D. C. No. 1."

5. That the land needed to provide for the viaduct and approaches thereto in the District of Columbia, together with the names and residences of the owner or owners thereof, so far as the same can be ascertained is particularly described as follows:

DESCRIPTIONS of land to be condemned for the MICHIGAN AVENUE VIADUCT.

WEST BROOKLAND, BLOCK 4,
TAXED AS SQUARE 3657.

Part of Lot 6.

Beginning for the same at the northeast corner of said Lot 6, said point of beginning being in the southerly line of Michigan Avenue as now publicly owned, and running thence with the east line of said Lot 6, South 2.74 feet; thence leaving said east line and running South $62^{\circ}52'$ West 33.706 feet to the east line of 7th Street, 90 feet wide; thence with said east line, North 1.98 feet to the Northwest corner of said Lot 6; thence with the southerly line of Michigan Avenue as now publicly owned, North $61^{\circ}43'30''$ East 34.06 feet to the point of beginning, containing 70.8 square feet.

Chas. W. & Elizabeth G. Hailer, owners.

Residence: 803 Michigan Avenue, N. E.

Part of Lot 7.

Beginning for the same at the northeast corner of said Lot 7, said point of beginning being in the southerly line of Michigan Avenue as now publicly owned, and running thence with the east line of said lot, South 3.50 feet; thence leaving said East line and running South $62^{\circ}52'$ West 33.706 feet to the west line of said lot; thence with said West line, North 2.74 feet to the southerly line of Michigan Avenue as now publicly owned; thence with said southerly line, North $61^{\circ}43'30''$ East 34.06 feet to the point of beginning, containing 93.8 square feet.

Henry Bohnert, owner.—Residence: 703 Michigan Avenue, N. E.

Part of Lot 8, taxed as Lot 806, Sq. 3657.

Beginning for the same at the Northeast corner of said Lot 806, said point of beginning being in the southerly line

of Michigan Avenue as now publicly owned, and running thence with the East line of said Lot 806, 4.16 feet; thence leaving said East line and running South $62^{\circ}52'$ West 29.206 feet to the west line of said Lot 806; thence with said West line, North 3.50 feet to the southerly line of Michigan Avenue as now publicly owned; thence with said Southerly line, North $61^{\circ}43'30''$ East 29.52 feet to the point of beginning, containing 99.5 square feet.

Henry Bohnert, owner.—Residence: 703 Michigan Avenue, N. E.

Part of Lot 8, taxed as Lot 807, Sq. 3657

Beginning for the same at the Northeast corner of said Lot 807, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with the East line of said Lot 807, South 4.26 feet; thence leaving said East line and running South $62^{\circ}52'$ West 4.5 feet to the West line of said Lot 807; thence with said West line, North 4.16 feet to the Southerly line of Michigan Avenue as now publicly owned; thence with said Southerly line, North $61^{\circ}43'30''$ East 4.54 feet to the point of beginning, containing 17 square feet.

Henry Bohnert, owner.—Residence: 703 Michigan Avenue, N. E.

Part of Lot 9.

Beginning for the same at the Northeast corner of said Lot 9, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with the East line of said lot, South 5.02 feet; thence leaving said East line and running South $62^{\circ}52'$ West 33.706 feet to the West line of said lot; thence with said West line, North 4.26 feet to the Southerly line of Michigan Avenue as now publicly owned; thence with said Southerly line, North $61^{\circ}43'30''$ East 34.06 feet to the point of beginning, containing 139.5 square feet.

4 Anna M. Glorius, owner.—Residence: 707 Michigan Ave., N. E.

Part of Lot 10.

Beginning for the same at the Northeast corner of said Lot 10, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running

thence with the East line of said lot, South 5.73 feet; thence leaving said East line and running South $62^{\circ}52'$ West 31.28 feet to the West line of said lot; thence with said West line, North 5.02 feet to the Southerly line of Michigan Avenue as now publicly owned; thence with said Southerly line, North $61^{\circ}43'30''$ East 31.60 feet to the point of beginning, containing 148.7 square feet.

Aylett T. Holtzman, owner.—Residence:_____.

SQUARE 3657.

Part of a parcel taxed as Lot 808, Square 3657.

Beginning for the same at the Northwest corner of said Lot 808, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with said Southerly line of Michigan Avenue, North $63^{\circ}08'30''$ East 129.80 feet to the most Northerly corner of said Lot 808; thence with the Easterly boundary of said lot, South $26^{\circ}51'30''$ East 9.46 feet; thence leaving said Easterly boundary and running South $62^{\circ}52'$ West 134.91 feet to the West boundary of said Lot 808; thence with said West boundary, North 11.35 feet to the point of beginning, containing 1295.6 square feet.

William H. Walker, owner.—Residence: 734 15th Street, N. W.

Part of a parcel taxed as Lot 809, Square 3657.

Beginning for the same at the Northwest corner of said Lot 809, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with said Southerly line of Michigan Avenue, North $63^{\circ}08'30''$ East 60.68 feet to the Northeast corner of said Lot 809; thence with the Easterly boundary of said lot, South $9^{\circ}05'30''$ East 9.63 feet; thence leaving said Easterly boundary and running South $62^{\circ}52'$ West 57.76 feet to the West-erly boundary of said lot thence with said Westerly bound-ary, North $26^{\circ}51'30''$ West 9.46 feet to the point of be-ginning, containing 551.30 square feet.

Chas. W. and Elizabeth G. Hailer, owners.

Residence: 803 Michigan Ave., N.E.

Part of a tract of land taxed as Parcel 133/27.

Beginning for the same at the Southeast corner of said Parcel 133/27, said point of beginning being in the Northerly line of Michigan Avenue as now publicly owned, and running thence with said Northerly line of Michigan Avenue, South $62^{\circ}52'$ West 100 feet to the Southwest corner of said Parcel 133/27; thence with the Easterly line of Brookland Avenue, North $13^{\circ}40'$ West 41.52 feet; thence leaving said Brookland Avenue and running North $43^{\circ}37'$ East 116.93 feet to the Easterly line of said Parcel 133/27; thence with said Easterly line, South $12^{\circ}52'20''$ East 81.44 feet to the point of beginning, containing 5988.8 square feet.

- 5 Baltimore & Ohio Railroad Company, owner.
Residence: Baltimore, Maryland.
-

Part of a tract of land taxed as Parcel 133/26.

Beginning for the same at the Southwest corner of said Parcel 133/26, and running thence with the Westerly boundary of said parcel, North $12^{\circ}52'20''$ West 107.84 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 94.91 feet to the Easterly boundary of said Parcel 133/26, said Easterly boundary being in the Westerly line of a road 20 feet wide; thence with said Westerly line of said road, South $14^{\circ}32'$ East 105.95 feet; thence leaving said road and running South $43^{\circ}37'$ West 98.29 feet to the Northerly line of Bunker Hill Road; thence with said northerly line, South $63^{\circ}05'$ West 0.26 ft. to the point of beginning, containing 8707.35 square feet.

Jeremiah Lynch, owner.—Residence:_____.

Part of a Road—

(said road running Northerly from Bunker Hill Road, and lying between Parcels 133/13 and 133/26)

Beginning for the same in the Westerly line of said road, 20 feet wide, at a point bearing North $14^{\circ}32'$ West 33.56 feet from the Southeast Corner of Parcel 133/26, and running thence with the westerly line of said road, 20 feet wide, North $14^{\circ}32'$ West 105.95 feet; thence leaving said Westerly

line and running North $43^{\circ}37'$ East 23.55 feet to the easterly line of said road, 20 feet wide; thence with said Easterly line, South $14^{\circ}32'$ East 105.95 feet; thence leaving said Easterly line and running South $43^{\circ}37'$ West 23.55 feet to the point of beginning, containing 2119 square feet.

(Not heretofore assessed)

Part of a tract of land taxed as Parcel 133/13.

Beginning for the same in the Westerly line of said Parcel 133/13, at a point bearing North $14^{\circ}32'$ West 41.60 feet from the Southwest corner of said Parcel 133/13, and running thence with the Westerly boundary of said parcel, North $14^{\circ}32'$ West 105.95 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 7.2 feet to the Northerly boundary of said Parcel 133/13; thence with said Northerly boundary, North $63^{\circ}02'$ East 89.22 feet to the Northeast corner of said Parcel 133/13; thence with the Easterly boundary of said parcel, South $14^{\circ}44'$ East 70.89 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 110.04 feet to the point of beginning, containing 8366.1 square feet.

Margaret Peck, owner,—Residence:

Part of a tract of land taxed as Parcel 133/78.

Beginning for the same at the Southeast corner of said Parcel 133/78, and running thence with the Southerly boundary of said parcel, South $63^{\circ}02'$ West 89.22 feet; thence leaving said Southerly boundary and running North $43^{\circ}37'$ East 102.43 feet to the Easterly boundary of said Parcel 133/78; thence with said Easterly boundary, South $14^{\circ}44'$ East 34.84 feet to the point of beginning, containing 1518.8 square feet.

William A. Wimsatt, owner.—Residence: 9th and Water Streets, S.W.

Part of a tract of land taxed as Parcel 133/20.

Beginning for the same in the Westerly boundary of said Parcel 133/20, at a point bearing North $14^{\circ}44'$ West 79.11 feet from the Southwest corner of said parcel, and running thence with the Westerly boundary of said parcel, North $14^{\circ}44'$ West 105.73 feet, thence leaving said Westerly

boundary and running North $43^{\circ}37'$ East 52.75 feet to the Easterly boundary of said Parcel 133/20; thence with said Easterly boundary, South $18^{\circ}01'$ East 102.28 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 59.64 feet to the point of beginning, containing 5057.5 square feet.

William A. Wimsatt, owner.—Residence: 9th & Water Streets, S.W.

Part of a tract of land taxed as Parcel 133/60.

Beginning for the same at the Southwest corner of said Parcel 133/60, and running thence with the Westerly boundary of said parcel, North $18^{\circ}01'$ West 48.81 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 50.10 feet to the Easterly boundary of said Parcel 133/60; thence with said Easterly boundary, South $21^{\circ}22'$ East 63.65 feet to the Southeast corner of said Parcel 133/60; thence with the Southerly boundary of said parcel, South $61^{\circ}14'$ West 48.65 feet to the point of beginning, containing 2611.1 square feet.

William A. Wimsatt, owner.—Residence: 9th & Water Streets, S.W.

Part of a tract of land taxed as Parcel 133/71.

Beginning for the same at the Southwest corner of said Parcel 133/71, and running thence with the Westerly boundary of said parcel, North $21^{\circ}22'$ West 63.65 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 96.46 feet to the Easterly boundary of said Parcel 133/71; thence with said Easterly boundary, South $28^{\circ}55'30''$ East 92.36 feet to the Southeast corner of said parcel; thence with the Southerly boundary of said parcel, South $61^{\circ}18'$ West 36.01 feet; thence still with said Southerly boundary, South $61^{\circ}14'$ West 64.38 feet to the point of beginning, containing 7416.4 square feet.

William A. Wimsatt, owner.—Residence: 9th & Water Streets, S.W.

Part of a tract of land taxed as Parcel 133/59.

Beginning for the same at the Northwest corner of said Parcel 133/59, and running thence with the Northerly boundary of said parcel, North $61^{\circ}14'$ East 37.68 feet to

the Northeast corner of said parcel; thence with the Easterly boundary of said parcel, South $21^{\circ}14'30''$ East 39.39 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 44.59 feet to the Westerly boundary of said Parcel 133/59; thence with said Westerly boundary, North $18^{\circ}01'$ West 53.47 feet to the point of beginning, containing 1784.3 square feet.

Marguerite G. Workman, owner.—Residence: 912 Michigan Ave., N.E.

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Part of a tract of land taxed as Parcel 133/54.

Beginning for the same at the Northwest corner of said Parcel 133/54, and running thence with the Northerly boundary of said parcel, North $61^{\circ}14'$ East 37.68 feet to the Northeast corner of said parcel; thence with the Easterly boundary of said Parcel 133/54, South $24^{\circ}31'$ East 26.13 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 42.90 feet to the Westerly boundary of said parcel; thence with said Westerly boundary, North $21^{\circ}14'30''$ West 39.39 feet to the point of beginning, containing 1255.5 square feet.

Margaret I. and Ursula Margt. Fessler, owners.

Residence: 914 Michigan Ave., N.E.

Part of a tract of land taxed as Parcel 133/70.

Beginning for the same at the Northwest corner of said Parcel 133/70, and running thence with the Northerly boundary of said parcel, North $61^{\circ}14'$ East 37.67 feet to the Northeast corner of said parcel; thence with the Easterly boundary of said parcel, South $27^{\circ}49'30''$ East 13.55 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 41.33 feet to the Westerly boundary of said Parcel 133/70; thence with said Westerly boundary, North $24^{\circ}31'$ West 26.13 feet to the point of beginning, containing 756.1 square feet.

Andrea M. & Germaine L. Beneteau, owners.

Residence: 916 Michigan Ave., N.E.

Part of a tract of land taxed as Parcel 133/43.

Beginning for the same at the Northwest corner of said Parcel 133/43, and running thence with the Northerly boundary of said parcel, North $61^{\circ}18'$ East 36.01 feet to the

Northeast corner of said parcel; thence with the Easterly boundary of said parcel, South $33^{\circ}52'$ East 1.96 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 38.21 feet to the Westerly boundary of said Parcel 133/43; thence with said Westerly boundary, North $27^{\circ}49'30''$ West 13.55 feet to the point of beginning, containing 280.6 square feet.

Rose V. Constantino, owner.—Residence: 918 Michigan Ave., N. E.

Part of a tract of land taxed as Parcel 133/49.

Beginning for the same at the Northwest corner of said Parcel 133/49, and running thence with the Northerly boundary of said parcel, North $57^{\circ}05'$ East 18.99 feet; thence leaving said Northerly boundary and running South $43^{\circ}37'$ West 19.68 feet to the Westerly boundary of said parcel; thence with said Westerly boundary, North $33^{\circ}52'$ West 1.96 feet to an angle; thence still with said Westerly boundary, North $28^{\circ}55'30''$ West 2.65 feet to the point of beginning 43.5 square feet.

Thomas Leonard, owner.—Residence: 920 Michigan Ave., N. E.

Part of a tract of land taxed as Parcel 133/50.

Beginning for the same at the Southwest corner of said Parcel 133/50, and running thence with the Westerly boundary of said parcel, North $28^{\circ}55'30''$ West 89.71 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 48.14 feet to the Easterly boundary of said parcel; thence with said Easterly boundary, South $32^{\circ}15'$ East 92.81 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 33.92 feet to the Southerly boundary of said Parcel 133/50; thence with said Southerly boundary, South $57^{\circ}05'$ West 18.99 feet to the point of beginning, containing 4543.6 square feet.

William A. Wimsatt, owner.—Residence: 9th & Water Streets, S. W.

Part of a tract of land taxed as Parcel 133/62.

Beginning for the same at the Southeast corner of said Parcel 133/62, and running thence South $43^{\circ}37'$ West 49.31 feet to the Westerly boundary of said parcel; thence with said Westerly boundary, North $32^{\circ}15'$ West 92.81 feet;

thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 44.10 feet to the Easterly boundary of said Parcel 133/62; thence with said Easterly boundary, South $35^{\circ}24'30''$ East 91.68 feet to the point of beginning, containing 4203.60 square feet.

William A Wimsatt, owner.—Residence: 9th & Water Streets, S.W.

Part of a tract of land taxed as Parcel 133/80.

Beginning for the same at the Southwest corner of said Parcel 133/80, and running thence with the Westerly boundary of said parcel, North $35^{\circ}24'30''$ West 23.71 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 116.84 feet to the Easterly boundary of said parcel; thence with said Easterly boundary, South $40^{\circ}52'$ East 31.63 feet to the Southeast corner of said Parcel 133/80; thence with the Southerly boundary of said parcel, South $47^{\circ}35'$ West 118.60 feet to the point of beginning, containing 3235.02 square feet.

William A. Wimsatt, owner.—Residence: 9th & Water Streets, S.W.

All of a tract of land taxed as Parcel 133/79,

containing 4517.40 square feet.

Rabert A. Ralph, owner.—Residence: 1000 Mich. Ave., N.E.

Part of a tract of land taxed as Parcel 133/51.

Beginning for the same at the Northeast corner of said Parcel 133/51, and running thence with the Easterly boundary of said parcel, South $33^{\circ}10'$ East 4.08 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 25.62 feet to the Northerly boundary of said parcel; thence with said Northerly boundary, North $35^{\circ}07'$ East 26.85 feet to the point of beginning, containing 50.8 square feet.

Ellis W. and Edith E. Hughes, owners.—Residence: 602 Kenyon St., N.W.

Part of a tract of land taxed as Parcel 133/47.

Being two separate parts of said Parcel 133/47 described as follows:

(1) Beginning for the same at the most Northerly corner of said Parcel 133/47, and running thence with the East-

erly boundary of said parcel, South $40^{\circ}41'$ East 40.55 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 66.71 feet to the Westerly boundary of said Parcel 133/47; thence with said Westerly boundary, North $33^{\circ}10'$ West 4.08 feet to the Northwest corner of said
 9 parcel; thence with the Northwesterly boundary of said parcel, North $16^{\circ}05'$ East 78.73 feet to the point of beginning, containing 1467.40 sq. ft.

(2) Beginning for the same at the most Easterly corner of said Parcel 133/47, and running thence with the Northwesterly line of Bunker Hill Road, South $15^{\circ}53'$ West 40.32 feet; thence leaving said Bunker Hill Road and running North $16^{\circ}56'20''$ West 83.55 feet to the Easterly boundary of said Parcel 133/47; thence with said Easterly boundary, South $40^{\circ}41'$ East 54.26 feet to the point of beginning, containing 912.8 square feet.

Elizabeth M. Ralph, owner.—Residence: 3620 Rittenhouse St., N.W.

Part of a tract of land taxed as Parcel 133/57.

Beginning for the same at the most Northerly corner of said Parcel 133/57, and running thence with the Easterly boundary of said parcel, South $40^{\circ}52'$ East 150 feet to the most Easterly corner of said parcel; thence with the Northwesterly line of Bunker Hill Road, South $15^{\circ}53'$ West 40 feet to the most Southerly corner of said parcel 133/57; thence with the Southwesterly boundary of said parcel, North $40^{\circ}41'$ West 54.26 feet; thence leaving said Southwesterly boundary and running North $16^{\circ}56'20''$ West 63.60 feet; thence South $43^{\circ}37'$ West 25.74 feet to the Southwesterly boundary of said Parcel 133/57; thence with said Southwesterly boundary, North $40^{\circ}41'$ West 40.55 feet; thence with the Northwesterly boundary of said parcel, North $16^{\circ}05'$ East 39.34 feet to the point of beginning, containing 4271.4 square feet.

Elizabeth M. Ralph, owner.—Residence: 3620 Rittenhouse St., N.W.

Part of a tract of land taxed as Parcel 134/46.

Beginning for the same at the most Southerly corner of said Parcel 134/46, and running thence with the Westerly boundary of said parcel, North $40^{\circ}52'$ West 74.28 feet; thence leaving said Westerly boundary and running North

43°37' East 34.58 feet to the West line of 10th Street, 90 feet wide; thence with said West line, South 16°56'20" East 84.89 feet to the point of beginning, containing 1278.58 square feet.

Charles H. and Lida R. Tompkins, owners.

Residence: 3001 Garrison Street, N.W.

Parts of a tract of land taxed as Parcel 134/45.

Being two separate parts of said Parcel 134/45 described as follows:

(1) Beginning for the same in the Easterly line of 10th Street at a point bearing North 16°56'20" West 61.45 feet from the most Southerly corner of said Parcel 134/45, and running thence with the Easterly line of 10th Street, 90 feet wide, North 16°56'20" West 103.35 feet; thence leaving said 10th Street and running North 43°37' East 45.36 feet; thence North 17°09' East 122.17 feet to the Northerly boundary of said Parcel 134/45; thence with said Northerly boundary, South 79°19' East 71.89 feet to the most Easterly corner of said parcel; thence with the Southeasterly boundary of said parcel, South 15°53' West 187.84 feet; thence leaving said Southeasterly boundary and running South 43°37' West 76.66 feet to the point of beginning, containing 16591.50 square feet.

(2) *Reservation*.—Beginning for the same at the most Southerly corner of said Parcel 134/45, said point
10 of beginning being the Northeast corner of 10th Street and Bunker Hill Road, and running thence with the Easterly line of 10th Street, 90 feet wide, North 16°56'20" West 61.45 feet; thence leaving said 10th Street and running North 43°37' East 76.66 feet to the Westerly line of Bunker Hill Road; thence with said Westerly line, South 15°53' West 119.52 feet to the point of beginning, containing 2051.28 square feet.

Charles R. and Lida R. Tompkins, owners.

Residence: 3001 Garrison Street, N.W.

Prayers

The premises considered, your petitioners pray:

1. That all persons interested in the land hereinbefore described may be cited to appear in this Court at a time to

be fixed by the Court to answer this petition and the prayers thereof.

2. That the said land hereinbefore described be condemned for subway purposes as provided for in the Acts of Congress above referred to.

3. That this Honorable Court appoint a jury of five capable and disinterested persons to appraise the value of the land to be taken for the aforesaid purpose, in accordance with the provisions of Chapter XV of the Code of Law for the District of Columbia, as amended.

4. That such other and further orders may be made and proceedings may be had in the premises as the nature of the case may require.

M. C. HAZEN

GEO E ALLEN

Commissioners, District of Columbia.

E BARRETT PRETTYMAN

WALTER L FOWLER

Attorneys for Petitioners.

11 DISTRICT OF COLUMBIA, ss:

Personally appears **Melvin C. Hazen**, who being duly sworn according to law, deposes and says that he is one of the Board of Commissioners of the District of Columbia; that he has read the foregoing petition of said Commissioners, and knows the contents thereof; that the facts therein stated upon personal knowledge are true and those stated upon information and belief, he believes to be true.

M. C. HAZEN

SUBSCRIBED AND SWORN TO before me this 8th day of July 1935.

ADAM A. GIEBEL

Notary Public, D. C.

(SEAL)

23

Memorandum

October 8-1935.

Appearance of George E. Sullivan for William Kurtz Wimsatt, et al, entered.

AVENUE

METROPOLITAN

BRANCH

ROAD

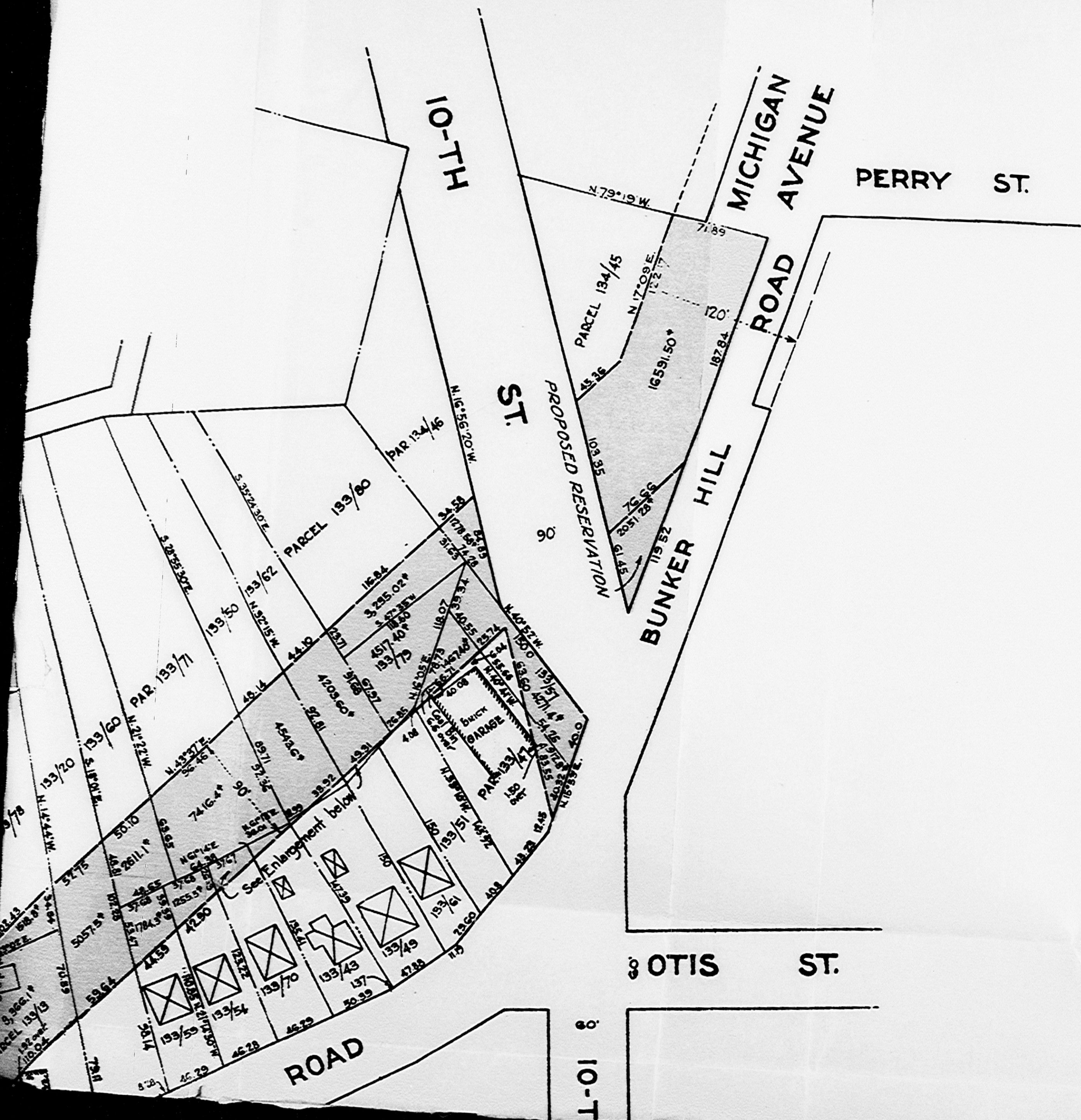
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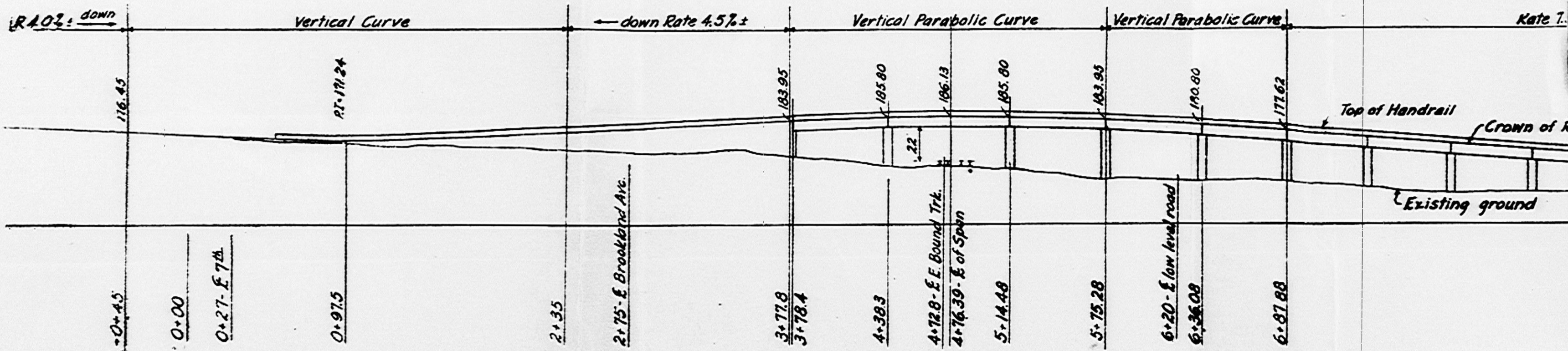
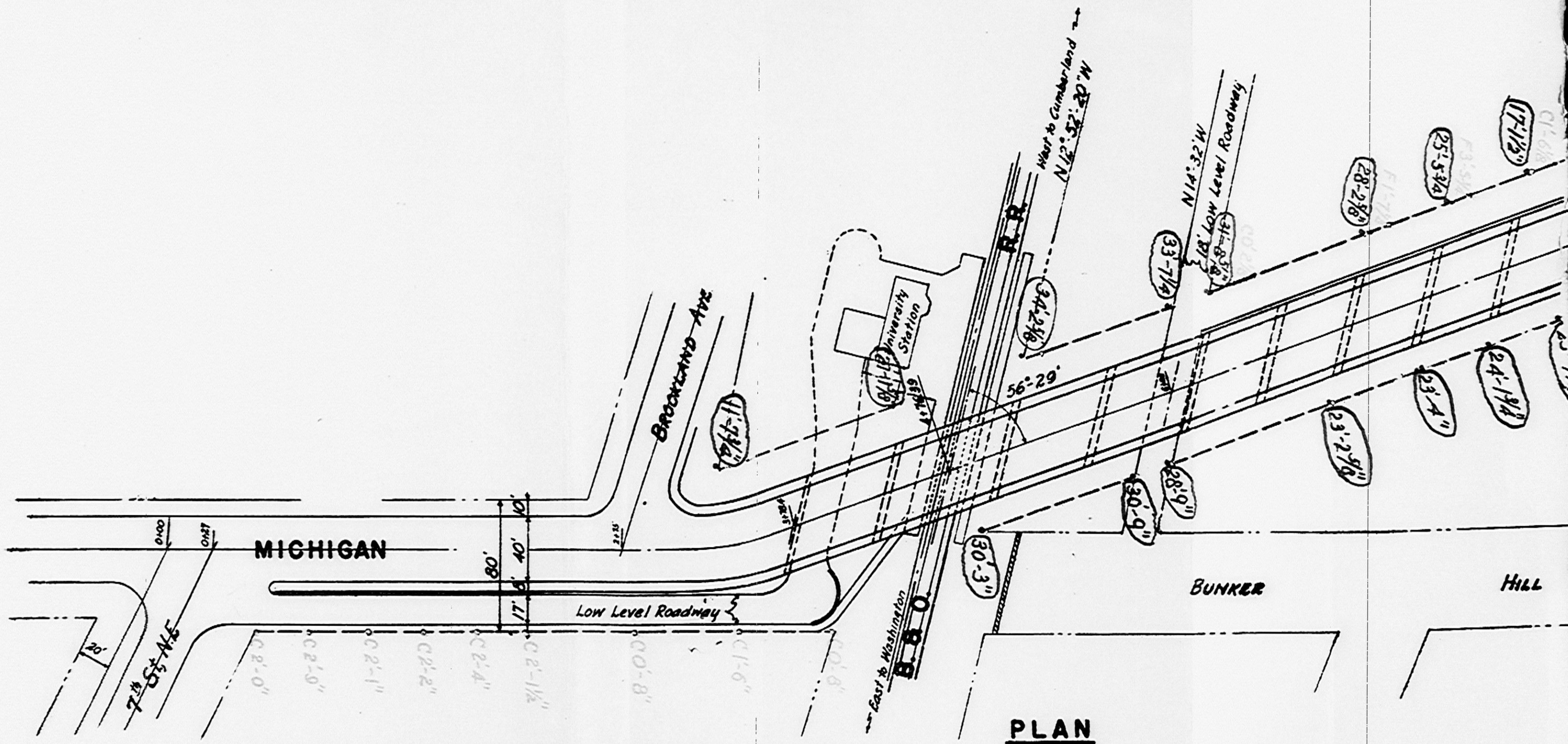
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12



PROFILE ON E OF MICHIGAN AVE.

Rates of grade, elevations, and stations are approximate

11

25

Amendment to Petition

Filed October 28 1935

* * * * *

Now comes Melvin C. Hazen, George E. Allen and Daniel I. Sultan, Commissioners of the District of Columbia, and by leave of the Court first had and obtained, hereby amend the petition filed in the above entitled cause as follows:

By adding immediately following Paragraph 4, the following Paragraph, or Section, to be designated "4-a":

That a map or plat showing the treatment of the Michigan Avenue Viaduct and approaches, in the District of Columbia, is hereto annexed as part of the Petition and marked "D. C. Exhibit No. 2".

M. C. HAZEN
GEO E ALLEN
DAN I. SULTAN

Commissioners, District of Columbia.

E BARRETT PRETTYMAN
WALTER L FOWLER
Attorneys for Petitioners.

Let this be filed 10/28/35
LUHRING—J

DISTRICT OF COLUMBIA, ss:

Personally appears **Melvin C. Hazen**, who being first duly sworn according to law, deposes and says that he is one of the Commissioners of the District of Columbia; that he has read the foregoing amendment to petition of said Commissioners and knows the contents thereof; that the facts therein stated upon his personal knowledge are true and those stated upon information and belief, he believes to be true.

M. C. HAZEN

SUBSCRIBED and sworn to before me this 25th day of October A. D. 1935.

ADAM A. GIEBEL
Notary Public, D.C.

(SEAL)

(Here follows photostat marked p. 26)

Instructions.

Filed December 17 1935

* * * * *

1. Before beginning their deliberations, the Jury should acquaint themselves with these written instructions given them by the Court, which constitute one comprehensive whole, and should be so read and considered by them. In other words, the instructions are to be applied as a whole to the facts of the case, and the jury should consider all the instructions together as they relate to the facts.

2. You are instructed that the burden of proof rests with the property owners to establish by a preponderance of the evidence the damages and resulting damages, if any, and that a similar burden of proof rests upon the petitioners, the Commissioners of the District of Columbia, with respect to the nature and extent of benefits claimed.

3. By the burden of proof is meant merely the greater weight of the evidence. This case is not to be decided by the greater number of witnesses but by the greater weight of the evidence and whatever is the greater weight of evidence is the preponderance of the evidence.

4. The jury are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In weighing the evidence of witnesses, you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness in giving their testimony, or the want of such candor or fairness, their interest, if any, in the result of this proceeding, the probability or improbability of their testimony, their knowledge or want of knowledge, the nature, character and extent of their experience, if any, and from these and all other facts and circumstances in evidence, you will determine the weight you will give to the testimony of each of the witnesses who have appeared here.

5. Gentlemen of the jury, your duties are to ascertain the damage which will be suffered by the respective owners of the several parcels of land condemned by these proceedings. You are instructed that the several parcels of land to be condemned are to be appraised at their present fair market value, with reference to the most advantageous use or uses to which they can be respectively put. By fair market value is meant what the

property would sell for in cash, or terms equivalent to cash, when offered for sale by one who is willing but not obliged to sell to one who desires but is not obliged to buy.

6. Present fair market value is to be determined as if no proceeding had been instituted for the purposes of condemnation; and the fair market value of the part or parts remaining of any lot, piece or parcel is to be determined in the light of the condition in which such part or parts will be left after the completion of the project contemplated by this proceeding.

7. The market value of the land is not limited to its value for the use or uses to which it is now being applied by the owners thereof or to the value indicated by their present income from such property. If the whole or any part or parts of said land is peculiarly adapted by its location, surroundings, natural advantages or intrinsic character, to some particular use or uses which gives it a higher market value than it would otherwise have, the circumstance or circumstances which make up such peculiar adaptability for such particular use or uses, shall be considered in determining its present fair market value for the most valuable use or uses for which it is adapted, including any existing use to which it is actually being put.

8. The several parcels are to be appraised as separate properties unless several contiguous parcels are in the same ownership and the value of any two or more such contiguous parcels shall be found to be greater than the value thereof for the purpose of sale as a whole, in which
30 latter event the jury shall determine value according to the grouping reflecting the greatest value.

9. You are instructed that Parcel 133/51 was owned by Ellis W. and Edith E. Hughes at the time of the filing of the petition in this case and in your consideration of this parcel you are to view it in this ownership and not in the same ownership as the Ralph properties, Parcels 133/47, 133/57 and 133/79.

10. The jury are further instructed that where part only of a lot or lots, parcel or parcels, and of the improvement or improvements, if any, upon the same, is taken, and that by taking thereof the remainder will be damaged, they should award to the owner the damages resulting to such remaining portion in addition to the damages allowed for the part actually taken of the land and improvements; and

the measure of such damages is the reduction in the market value of the remainder of such land and improvements.

11. If in connection with any lot piece or parcel the remainder not taken should be found to be specifically benefited or increased in value rather than damaged or decreased in value the amount of the special benefit or enhancement in value should be deducted from the damages allowed for the part actually taken of the land and improvements.

12. In determining the amount of the damages and also the amount of the benefits, either or both as the case may be, against any remainder of a lot or lots or parcel or parcels of land or any group of two or more lots or parcels, you shall take carefully into consideration the respective situations and topographical conditions of such lots, pieces, parcels and groups of the same before the taking and of the remainders thereof after the taking, and the damages

and also the special benefits, if any, either or both
31 as the case may be, that the said remainders will suffer or receive from the project contemplated by these proceedings, and the jury for the purposes of allowance of damages or benefits, if any, either or both, shall consider the project as completed for all the ordinary purposes of a public thoroughfare.

13. The amount of damages, including resulting damages, if any, awarded for any parcel must be shown by direct evidence and established to your satisfaction by the preponderance of the evidence. Likewise, no deduction from such damages for special benefits, if any, is allowable, unless the existence and extent of special benefits be shown by direct evidence and established to your satisfaction by the preponderance of the evidence.

14. You are instructed that the cost of reproduction of the structural value of any building or improvement which may be located in whole or in part upon any of the land to be taken is competent evidence only insofar as it tends to show the market value of or the damage to the property.

15. The jury should award no damage for the proposed barricade of the grade crossing at Bunker Hill Road and Michigan Avenue, and should award no damage for diversion of traffic, and no damage for the viaduct except insofar as the jury may believe that the change of grade caused by the construction of the viaduct and approaches affects values, or causes damages.

16. The jury are instructed that in appraising the value of the lands in this proceeding, no compensation can be allowed for the loss of future profits or business of any character, or for any injury to business whatsoever, for personal property, or the expense or inconvenience of moving the same. Nor can the difficulty of procuring other places of residence or for business purposes be considered.

17. The jury are instructed that the land in the
32 20-foot private right of way adjoining Parcel 133/
26 is subject to a perpetual easement of way for the accommodation of the owners and occupants of the lots abutting the same and can have only such value as it fairly may be believed that a purchaser in fair market conditions would pay for the fee simple in said 20-foot strip subject to such easement of way and not the value that said land would have if not encumbered by said easement.

18. The damages awarded for the several parcels of land condemned in these proceedings can not be arrived at arbitrarily, but must be actual, direct and positive, nor can damages be arbitrarily reduced by supposed special benefits or be increased by supposed resulting damage which are not found to produce an actual enhancement or decrease in market value, but any such special benefits or resulting damages must be actual, direct and positive.

19. The jury shall not consider for any purpose the assessment for taxation upon any property nor shall they acquire information regarding same or permit themselves to become informed thereof in any way whatever.

20. The law requires that the jury view and examine the property sought to be taken. This not only enable the jury to see for themselves the nature, character, location and general surroundings of the property so that they may intelligently follow the testimony of the witnesses, but it also enables the jury to form its own opinion and judgment as to the questions you are now called upon to decide. You shall take into consideration the opinions of the witnesses who have testified as to damages and benefits, and give to such opinions the weight to which you think them fairly entitled, but you are not restricted to a mere consideration of the evidence adduced by the parties. You may exercise
your own powers of judgment and observation as
33 well in arriving at your appraisements and verdict.
You must, however, confine your deliberations to the

evidence that has been offered and to your own judgment based on your view and inspection of the property.

21. The jury shall not collectively or individually hold any communication with or receive any communication or information from any source whatever, including the parties interested in this proceeding, the petitioners or anyone representing the District Government or property owners, and they can consider no information whatever except what they have received from the witness stand and what they acquire by looking at the properties at their view or views of the same.

22. The jury, during the course of its deliberations, may of its own motion and without application to court or counsel make such further view or views of the properties involved as it may deem necessary, provided the whole jury is present and no one else is present with them. If anyone else is to be permitted to be present at any such view or views the jury must first report to the Court and receive its further instructions before making any view at which anyone other than themselves is to be present.

23. The jury may consult its own convenience as to the time and place of meeting for the purpose of deliberation, but should endeavor to reach a conclusion and return its verdict as speedily as possible. The verdict should be in writing, signed by them or a majority of them, and should be returned to the Court on or before the 20th day of January, 1936.

O. R. LUHRING,
Justice.

Report and Award of Jurors

Filed February 10 1936

* * * * *

The undersigned heretofore appointed jurors by this Honorable Court to appraise the value of the respective interests of all persons concerned in the land and premises mentioned and described in the petition filed in the above entitled cause, respectfully show to the Court:

That after being duly sworn by the Court for the proper performance of our duty, and after due notice to all parties interested, we examined the land and premises herein-

after described, and, thereafter, after due notice to all parties interested, we heard the testimony in Court of the witnesses offered on behalf of the parties in interest; and upon our personal examination aforesaid, and the testimony aforesaid, we estimate, appraise and determine the value of the respective interests of all persons concerned in the land and premises aforesaid to be as follows:

West Brookland, Block 4, Taxed as Square 3657.

Part of Lot 6.

Beginning for the same at the northeast corner of said Lot 6, said point of beginning being in the southerly line of Michigan Avenue as now publicly owned, and running thence with the east line of said Lot 6, South 2.74 feet; thence leaving said east line and running South $62^{\circ}52'$ West 33.706 feet to the east line of 7th Street, 90 feet wide; thence with said east line, North 1.98 feet to the Northwest corner of said Lot 6; thence with the southerly line of Michigan Avenue as now publicly owned, North $61^{\circ}43'30''$ East 34.06 feet to the point of beginning, containing 70.8 square feet, damages in the amount of Two Hundred Forty Eight Dollars 32/100 Dollars (\$248.32)

35 Part of Lot 8, taxed as Lot 806, Sq. 3657.

Beginning for the same at the Northeast corner of said Lot 806, said point of beginning being in the southerly line of Michigan Avenue as now publicly owned, and running thence with the East line of said Lot 806, 4.16 feet; thence leaving said East line and running South $62^{\circ}52'$ West 29.206 feet to the west line of said Lot 806; thence with said West line, North 3.50 feet to the southerly line of Michigan Avenue as now publicly owned; thence with said Southerly line, North $61^{\circ}43'30''$ East 29.52 feet to the point of beginning, containing 99.5 square feet, damages in the amount of Four hundred twenty six and 10/100 Dollars (\$426.10)

Part of Lot 8, taxed as Lot 807, Sq. 3657.

Beginning for the same at the Northeast corner of said Lot 807, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with the East line of said Lot 807, South 4.26 feet;

thence leaving said East line and running South $62^{\circ}52'$ West 4.5 feet to the West line of said Lot 807; thence with said West line, North 4.16 feet to the Southerly line of Michigan Avenue as now publicly owned; thence with said Southerly line, North $61^{\circ}43'30''$ East 4.54 feet to the point of beginning, containing 17 square feet, damages in the amount of Sixty nine and 40/100 Dollars (\$69.40)

Part of Lot 9.

Beginning for the same at the Northeast corner of said Lot 9, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with the East line of said lot, South 5.02 feet; thence leaving said East line and running South $62^{\circ}52'$ West 33.706 feet to the West line of said lot; thence with said West line, North 4.26 feet to the Southerly line of Michigan Avenue as now publicly owned; thence with said southerly line, North $61^{\circ}43'30''$ East 34.06 feet to the point of beginning, containing 139.5 square feet, damages in the amount of Six hundred thirteen and 90/100 Dollars (\$613.90)

Part of Lot 10.

Beginning for the same at the Northeast corner of said Lot 10, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with the East line of said lot, South 5.73 feet; thence leaving said East line and running South $62^{\circ}52'$ West 31.28 feet to the West line of said lot; thence with said West line, North 5.02 feet to the Southerly line of Michigan Avenue as now publicly owned; thence with said Southerly line, North $61^{\circ}43'30''$ East 31.60 feet to the point of beginning, containing 148.7 square feet, damages in the amount of Seventeen hundred fifty one and 80/100 Dollars (\$1751.80)

36 Part of a parcel taxed as Lot 808.

Beginning for the same at the Northwest corner of said Lot 808, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with said Southerly line of Michigan Avenue, North $63^{\circ}08'30''$ East 129.80 feet to the most Northerly corner of said Lot 808; thence with the Easterly boundary of said lot, South $26^{\circ}51'30''$ East 9.46 feet; thence leaving

said Easterly boundary and running South $62^{\circ}52'$ West 134.91 feet to the West boundary of said Lot 808; thence with said West boundary, North 11.35 feet to the point of beginning, containing 1295.6 square feet, damages in the amount of Thirty hundred sixty nine and $15/100$ Dollars (\$3069.15).

Part of a parcel taxed as Lot 809.

Beginning for the same at the Northwest corner of said Lot 809, said point of beginning being in the Southerly line of Michigan Avenue as now publicly owned, and running thence with said Southerly line of Michigan Avenue, North $63^{\circ}08'30''$ East 60.68 feet to the Northeast corner of said Lot 809; thence with the Easterly boundary of said lot, South $9^{\circ}05'30''$ East 9.63 feet; thence leaving said Easterly boundary and running South $62^{\circ}52'$ West 57.76 feet to the Westerly boundary of said lot; thence with said Westerly boundary, North $26^{\circ}51'30''$ West 9.46 feet to the point of beginning, containing 551.30 square feet, damages in the amount of Fifteen hundred nine and $18/100$ Dollars (\$1509.18).

37 Part of a Road—(said road running Northerly from Bunker Hill Road, and lying between Parcels 133/13 and 133/26).

Beginning for the same in the Westerly line of said road, 20 feet wide, at a point bearing North $14^{\circ}32'$ West 33.56 feet from the Southeast corner of Parcel 133/26, and running thence with the westerly line of said road, 20 feet wide, North $14^{\circ}32'$ West 105.95 feet; thence leaving said Westerly line and running North $43^{\circ}37'$ East 23.55 feet to the Easterly line of said road, 20 feet wide; thence with said Easterly line, South $14^{\circ}32'$ East 105.95 feet; thence leaving said Easterly line and running South $43^{\circ}37'$ West 23.55 feet to the point of beginning, containing 2119 square feet, damages in the amount of One hundred five and $95/100$ Dollars (\$105.95).

Part of a tract of land taxed as Parcel 133/78.

Beginning for the same at the Southeast corner of said Parcel 133/78 and running thence with the Southerly boundary of said parcel, South $63^{\circ}02'$ West 89.22 feet; thence leaving said Southerly boundary and running North $43^{\circ}37'$

East 102.43 feet to the Easterly boundary of said Parcel 133/78; thence with said Easterly boundary, South $14^{\circ}44'$ East 34.84 feet to the point of beginning, containing 1518.8 square feet, damages in the amount of Five hundred thirty one and 58/100 Dollars (\$531.58)

Part of a tract of land taxed as Parcel 133/20.

Beginning for the same in the Westerly boundary of said Parcel 133/20, at a point bearing North $14^{\circ}44'$ West 79.11 feet from the Southwest corner of said parcel, and running thence with the Westerly boundary of said parcel, North $14^{\circ}44'$ West 105.73 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 52.75 feet to the Easterly boundary of said Parcel 133/20; thence with said Easterly boundary, South $18^{\circ}01'$ East 102.28 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 59.64 feet to the point of beginning, containing 5057.5 square feet, damages in the amount of Twenty five hundred twenty eight and 75/100 Dollars (\$2528.75).

Part of a tract of land taxed as Parcel 133/60.

Beginning for the same at the Southwest corner of said Parcel 133/60, and running thence with the Westerly boundary of said parcel, North $18^{\circ}01'$ West 48.81 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 50.10 feet to the Easterly boundary of said Parcel 133/60; thence with said Easterly boundary, South 38 $21^{\circ}22'$ East 63.65 feet to the Southeast corner of said Parcel 133/60; thence with the Southerly boundary of said parcel, South $61^{\circ}14'$ West 48.65 feet to the point of beginning, containing 2611.1 square feet, damages in the amount of Six hundred fifty two and 78/100 Dollars (\$652.78).

Part of a tract of land taxed as Parcel 133/71.

Beginning for the same at the Southwest corner of said Parcel 133/71 and running thence with the Westerly boundary of said parcel, North $21^{\circ}22'$ West 63.65 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 96.46 feet to the Easterly boundary of said Parcel 133/71; thence with said Easterly boundary, South $28^{\circ}55'30''$ East 92.36 feet to the Southeast corner of said parcel; thence with the Southerly boundary of said parcel,

South $61^{\circ}18'$ West 36.01 feet; thence still with said Southerly boundary, South $61^{\circ}14'$ West 64.38 feet to the point of beginning, containing 7416.4 square feet, damages in the amount of Eighteen hundred fifty four and 10/100 Dollars (\$1854.10).

Part of a tract of land taxed as Parcel 133/50.

39 Beginning for the same at the Southwest corner of said Parcel 133/50 and running thence with the Westerly boundary of said parcel, North $28^{\circ}55'30''$ West 89.71 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 48.14 feet to the Easterly boundary of said parcel; thence with said Easterly boundary, South $32^{\circ}15'$ East 92.81 feet; thence leaving said Easterly boundary and running South $43^{\circ}37'$ West 33.92 feet to the Southerly boundary of said Parcel 133/50; thence with said Southerly boundary, South $57^{\circ}05'$ West 18.99 feet to the point of beginning, containing 4543.6 square feet, damages in the amount of Eleven hundred thirty five and 90/100 Dollars (\$1135.90)

Part of a tract of land taxed as Parcel 133/62.

Beginning for the same at the Southeast corner of said Parcel 133/62, and running thence South $43^{\circ}37'$ West 49.31 feet to the Westerly boundary of said parcel; thence with said Westerly boundary, North $32^{\circ}15'$ West 92.81 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 44.10 feet to the Easterly boundary of said Parcel 133/62; thence with said Easterly boundary, South $35^{\circ}24'30''$ East 91.68 feet to the point of beginning, containing 4203.60 square feet, damages in the amount of Ten hundred fifty and 90/100 Dollars (\$1050.90).

Part of a tract of land taxed as Parcel 133/80.

Beginning for the same at the Southwest corner of said Parcel 133/80 and running thence with the Westerly boundary of said parcel, North $35^{\circ}24'30''$ West 23.71 feet; thence leaving said Westerly boundary and running North $43^{\circ}37'$ East 116.84 feet to the Easterly boundary of said parcel; thence with said Easterly boundary, South $40^{\circ}52'$ East 31.63 feet to the Southeast corner of said Parcel 133/80; thence with the Southerly boundary of said parcel, South $47^{\circ}35'$ West 118.60 feet to the point of beginning, containing

3235.02 square feet, damages in the amount of Eight hundred eight and 75/100 Dollars (\$808.75)

41 IN WITNESS WHEREOF, we have hereunto set our hands and seals this 7th day of February A. D. 1936.

FRANK O BOWMAN (Seal)
 JESSE L ERGOOD (Seal)
 JOHN I. FORD, (Seal)
 MICHAEL P. KIRBY (Seal)
 CHAS. A. CAMALIER. (Seal)

42 *Objections and Exceptions of William H. Walker*

Filed March 2 1936

* * * * *

William H. Walker, as owner of Lot 808 in Square 3657, showing to the Court that the verdict in the above entitled cause filed is unjust and unreasonable for the reasons hereinafter stated, objects and excepts thereto, and moves the Court to vacate and set aside said verdict, upon each and every of the several and separate objections and exceptions following, namely:

1. The allowance of damages for the land taken is contrary to the weight of the evidence and grossly inadequate.

2. The verdict is arbitrary, capricious and confiscatory.

3. The verdict was, in part, based upon the assumption that the Michigan Avenue crossing over the tracks of the Baltimore and Ohio Railway will remain open for traffic.

4. The jury, in allowing damages for the land taken, disregarded the instructions of the Court as contained in instruction numbered 12.

5. The jury, in allowing damages for the land taken, disregarded the instructions of the Court as contained in instruction numbered 13.

6. The jury, in allowing damages for the land taken, disregarded the instructions of the Court as contained in instruction numbered 18.

7. The jury, in allowing damages for the land taken, disregarded the instructions of the Court as contained in instruction numbered 20.

8. The verdict was, in part, based upon instruction numbered 15 which was erroneously given to them by the

43 Court.

9. The verdict was influenced by the unfair, improper and intemperate language used by the Corporation Counsel in his argument to the jury.

CLEPHANE & LATIMER
GILBERT L. HALL
By GILBERT L. HALL.

*Exceptions and Objections on Behalf of Elizabeth and
C. W. Hailer*

Filed March 2 1936

* * * * *

Comes now Elizabeth and C. W. Hailer, by their attorney of record, Frank Van Sant, showing to the Court that the verdict filed in the above entitled cause is unjust and unreasonable for the reasons hereinafter fully specified, object and except thereto and moves the Court to vacate and set aside the said verdict with respect to the aforesaid properties, upon each and every of the objections and exceptions, namely:

1. That the verdict is confiscatory and amounts to the taking of the property of exceptants without just compensation.

2. That the verdict is arbitrary and capricious and against the preponderance of the evidence adduced.

3. That the verdict ignored the barricading of the railroad crossing as shown by the exhibits and testimony is to be done, closing off through traffic.

4. That the verdict is erroneous in that the instructions as given to the jurors by the Court were violated in arriving at said verdict.

5. That the damages resulting to the remainders of the lots by the taking are grossly inadequate and against
44 the weight or preponderance of the evidence.

6. That the verdict failed to give effect to the condition of the properties after completion of the project.

7. For divers errors and omissions, patent or obvious to the Court from the evidence adduced.

FRANK VAN SANT

Objections and Exceptions by Owners of Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80.

Filed March 2 1936

* * * * *

Come now William K. Wimsatt, Herman M. Grimes, and Robert C. Wimsatt, trustees under will of William A. Wimsatt, deceased, the owners of parcels described in the petition herein as Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78 and 133/80, and hereby file their objections and exceptions to the verdict of the jury in the above-entitled cause in so far as the same relates to said several parcels:

1. Said verdict is unjust and unreasonable.
2. The said verdict is unsupported by the evidence.
3. The said verdict is contrary to the evidence.
4. The said verdict allowed no damages for exceptants' rights of way.
5. The damages allowed by the said verdict for these exceptants' said lands, is entirely inadequate, both as to said lands considered as a whole and as to the same considered separately.
6. The verdict is contrary to the law.
7. The verdict is contrary to the instructions of the court.
8. The verdict of the jury should be set aside because of errors of law committed by the trial justice in the course of the hearing before him, including actions taken by him upon questions of law raised during the course of the hearing, refusing to grant instructions to the jury requested by the property owners, refusing to modify instructions to the jury requested by the petitioners, and granting instructions to the jury requested by the petitioners. Each and every such error of law is comprehended by this exception as if separately and severally set out herein, and this exception is to be taken and considered as if it contained such separate and several specifications of the errors of law comprehended hereby.

GEO. E. SULLIVAN

Attorney for Exceptants, William K. Wimsatt, Herman M. Grimes, and Robert C. Grimes, Trustees under will of William A. Wimsatt, Deceased.

*Motion to Strike Objections and Exceptions Filed on Behalf
of William H. Walker*

Filed March 4 1936

* * * * *

Now comes the Commissioners of the District of Columbia, petitioners herein, by their counsel, and move the Court to strike the objections and exceptions filed herein on behalf of William H. Walker, owner of Lot 808, Square 3657, and for cause of motion say:

1. That said objections and exceptions to the verdict were not filed within the time prescribed by law.

E BARRETT PRETTYMAN
WALTER L FOWLER
Attorneys for Petitioners.

46 WALTER C. CLEPHANE, Esq.,
J. WILMER LATIMER, Esq.,
GILBERT L. HALL, Esq.,

Please take notice that the above entitled cause will be called to the attention of the Court on the 6th day of March, 1936, at 10 A.M., or as soon thereafter as counsel can be heard.

E BARRETT PRETTYMAN
WALTER L FOWLER
Attorneys for Petitioners.

Service Accepted, March 3, 1936.
GILBERT L. HALL—

*Motion to Strike Objections and Exceptions Filed on Behalf
of Elizabeth and C. W. Hailer*

Filed March 4 1936

* * * * *

Now comes the Commissioners of the District of Columbia, petitioners herein, by their counsel, and move the Court to strike the objections and exceptions filed herein on behalf of Elizabeth and C. W. Hailer, owners of Lots 6 and 809 in Square 3657, and for cause of motion say:

1. That said objections and exceptions to the verdict were not filed within the time prescribed by law.

E BARRETT PRETTYMAN
WALTER L FOWLER
Attorneys for Petitioners.

FRANK VAN SANT, Esq.,

Please take notice that the above entitled cause will be called to the attention of the Court on the 6th day of March, 1936, at 10 A.M., or so soon thereafter as counsel can be heard.

E BARRETT PRETTYMAN
WALTER L FOWLER
Attorneys for Petitioners.

Service Accepted: March 3, 1936.
FRANK VAN SANT.

47 *Motion to Strike Objections and Exceptions Filed on
 Behalf of Owners of Parcels 133/20, 133/50, 133/60,
 133/62, 133/71, 133/78, 133/80*

Filed March 4 1936

* * * * * * * *

Now comes the Commissioners of the District of Columbia, petitioners herein, by their counsel, and move the Court to strike the objections and exceptions filed herein on behalf of William K. Wimsatt, Herman M. Grimes and Robert C. Wimsatt, trustees under the will of William A. Wimsatt, deceased, owners of parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78 and 133/80, and for cause of motion say:

1. That said objections and exceptions to the verdict were not filed within the time prescribed by law.

E BARRETT PRETTYMAN
WALTER L FOWLER
Attorneys for Petitioners.

GEORGE E. SULLIVAN, Esq.,

Please take notice that the above entitled cause will be called to the attention of the Court on the 6th day of March,

1936, at 10 A.M., or as soon thereafter as counsel can be heard.

E BARRETT PRETTYMAN
WALTER L FOWLER

Attorneys for Petitioners.

Service accepted, March 3, 1936.

GEO E. SULLIVAN

48 *Memorandum Sustaining Motions to Strike.*

Filed March 17 1936

* * * * * * * *

This is a proceeding for the condemnation of land for the Michigan Avenue viaduct and approaches. It is based on an Act of Congress, approved February 12th, 1931, entitled "An Act to amend the Act entitled 'An Act to provide for the elimination of the Michigan Avenue Grade Crossing in the District of Columbia and for other purposes,'" approved March 3rd, 1927, and Chapter XV of the Code of Laws for the District of Columbia, as amended by the Act of March 13th, 1929. Tit. 25, §§ 41-50, Code D. C.

Hearing was had and thereafter, on the 10th day of February, 1936, the jury returned to the court their appraisement of the value of the interests of all persons respectively in the land involved.

Various persons interested filed objections and exceptions to the appraisement on the 2nd day of March, 1936. On the 4th day of March, 1936, the District of Columbia filed its several motions to strike such objections and exceptions on the ground "that said objections and exceptions to the verdict were not filed within the time prescribed by law."

It is provided by §487 of Chap. XV, Code of Laws, D. C., as amended, (Tit. 25, §46, Code D. C.): "That the objections or exceptions to the appraisement shall be filed within twenty days after the return of the appraisement to the court.

It is agreed that in the computation of the time the 10th day of February, 1936, the day when the jury's appraise-

ment was returned to the court, is to be excluded and the last day included. Thus, beginning with February 11th and counting February 28th and 29th as two days, the twentieth day will fall on Sunday, March 1st, 1936. As we

49 have pointed out, the objections and exceptions were filed on Monday, March 2nd, 1936.

This presents the questions (a) whether or not, this being a leap-year, February 28th and 29th must be counted as one day, (Tit. 19, §113, Code D. C.) and (b) if not, may the objections and exceptions be filed on Monday, the next secular day.

The Gregorian calendar and mode of computation of time were adopted in England and in the English dominions throughout the world in 1752 by statute, 24 Geo. II, c. 23. 2 Minor's Inst. (4th ed.) 188. By a similar statute, this calendar has been adopted in the District of Columbia. Tit. 19, §111, Code D. C.

The word year means the period in which the earth fully completes its annual orbit around the sun. This is commonly computed to be actually 365 days and 6 hours. However, at common law, a year consisted of 365 days and was so computed.

"Half a year is reckoned always for 182 days in England, and a quarter of a year 91 days. When the year consists of 365 days, this is a necessary rule, in order to avoid a *fraction of a day*, and in leap-year it grows out of the Stat. *de anno bissextile*, 21 Hen. III, enacting that the intercalated day in leap-year, together with the preceding day, shall be accounted *for one day only*. 2 Minor's Inst. (4th ed.) 188. See, also, 2 Cooley's Blackstone (4th ed.) 543 and 26 Ruling Case Law 731. The Stat. 21 Hen. III is in force in the District of Columbia. Tit. 19, §113, Code D. C.

Tit. 19, §113, Code D. C. and its English prototype, 21 Hen. III, apply only to periods measured in years, and where the period is measured in days, the 28th and 29th of February are to be counted as two days. 62 C. J. 1009; *Helphenstine v. Vincennes National Bank*, 65 Ind. 582, 32 A. R. 86.

50 The recent cases support the rule that when an act is to be done within a time fixed by statute, and the last day thereof falls on a Sunday, that day will not be excluded, unless a different rule for computing the time

is provided by statute. *Shefer v. Magone*, 47 Fed. 872; *Johnson v. Meyers*, 54 Fed. 417; *Meyer v. Hot Springs Imp. Co.*, 169 Fed. 628; *Siegelschiffer v. Penn. Mutual Life Ins. Co.*, 248 Fed. 226; *Maresca v. U. S.*, 277 Fed. 727, cert. denied 257 U. S. 657; *In re Anttonen*, 293 Fed. 473; *Northwestern Publ Ser. Co. v. Pfeifer*, 36 Fed. (2d) 5; *Larkin Packer Co. v. Hinderliter Tool Co.*, 60 Fed. (2d) 491; *Walters v. B & O R. Co.*, 76 Fed. (2d) 599; *Payne v. Hunt*, (Cal.) 7 Pac. (2d) 302, motion for new trial; *Lowry v. Stotts*, 138 Ky. 251, petition to contest election; *Winkel v. Geiger*, 154 Md. 673, appeal from an order. See, also, 26 Ruling Case Law 750.

It seems that a more liberal view is taken in the construction of rules of court, and it is held that the trial court has power, where the final date for filing a transcript of the record falls on Sunday, which is followed by a legal holiday, to grant on the next succeeding day an application for an extension of the time for filing the transcript. *Lamson v. Andrews*, 40 App. D. C. 39. So, also, in cases where the purpose and intent of the legislature is manifest and time is not vital, or where a power may be exercised up to and including a given day of the month, and the last day happens to be Sunday, the act may be performed on the succeeding secular day. *Street v. United States*, 133 U. S. 299.

In *Street v. United States*, supra, an Act of Congress authorized the President to transfer officers from active duty to the list of supernumeraries, and, prior to January 1st, 1871, to fill vacancies on the active list by supernumerary officers, it was held that since January 1st, 1871 fell on Sunday the transfer to the supernumerary list on Monday,

January 2nd, was proper. Mr. Justice Brewer, delivering the opinion of the court, said:

“The purpose of this Act is obvious. The direction of Congress was clear and distant, and it would be strange if any executive officer could, by irregularity in executing the mandate of Congress, thwart this purpose. The matter of time was not vital. The purpose was reduction, and a reduction to be accomplished by selecting the best and mustering out the poorer element; and while Congress prescribed the time within which this mandate was to be executed, there is neither in terms nor by implication any subordination of the power to the matter of time.

“Again, it must be noticed that the first day of January was Sunday, that is, *a dies non*, and a power that may be exercised up to and including *a given day of the month* may generally, when that happens to be Sunday, be exercised on the succeeding day.” (Italics supplied).

In construing the statutes of Texas with regard to the purchase of school lands, the Supreme Court of the United States in *Monroe Cattle Company v. Becker*, 147 U. S. 47, observed that it was the obvious intent and purpose and even the solicitude of the legislature to prevent a monopoly of these lands by capitalists, or their withdrawal from the market by fictitious applications, and held that the surveyor could not receive another application during the ninety days allowed to a prior applicant to make his first payment. The ninety day period in this case expired on Sunday, November 26th, and the application was filed on Saturday, November 25th. The court said:

“As the nineteenth day fell on Sunday, the lands were not open to another application until Monday, the general rule being that, when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation.”

The statute here under consideration is positive and mandatory. No provision is made for the extension of the time within which the objections or exceptions to the appraisement may be filed, nor for the exclusion of Sundays and holidays in the computation of the time. The jurisdiction of the court is limited to a consideration of only such
52 exceptions as are filed within twenty days after the return of the appraisement. When that time expires, it is made the duty of the court to confirm the appraisement. *Shannon and Luchs Const. Co. v. Reichelderfer*, 61 App. D. C. 36.

In *Shannon and Luchs Const. Co. v. Reichelderfer*, *supra*, the court dealt with the statute here under consideration. Mr. Justice Van Orsdel, who delivered the opinion, said:

“But the limitation here is statutory, and relates to proceedings after verdict. Under those circumstances the rule is different. The objections and exceptions are in the nature of a motion for a new trial, and must be filed within the time limited.”

See, also, Covey v. Williamson, 52 App. D. C. 289.

The court can find no act of Congress similar to the statutes of several of the States which specifically provide that in computing the time within which an act is to be done or other proceeding had, Sundays and holidays are to be excluded. See Note to Simmons v. Hanne, (50 Fla. 267), 7 Am. and Eng. Ann. Cases 325, where list of such states is given. Congress knew that in any period of twenty days one or more Sundays would intervene, and if it was intended to exclude the Sunday in the computation apt provision would have been made. See Tit. 25, §110, f, Code D. C., of the statute for the acquisition of land in the District of Columbia for use of the United States, where it is provided that "no motion * * * to set aside or vacate the verdict * * * shall be made after the expiration of twenty days, Sundays and legal holidays excluded, from the rendition thereof; * * * ." See, also, Negotiable Instruments Act, Tit. 22, §126, Code D. C., providing that "when the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day." Specific provision is made in the Bankruptcy Act, Tit. 11, §55, U. S. C. A., for the computation of time, and it
53 is there provided that "whenever time is enumerated by days * * * the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or legal holiday."

The court is of opinion that Sunday, March 1st, was the last day for the filing of the objections and exceptions, and that the filing on Monday, March 2nd, was too late.

The motions to strike must be sustained.

O R LUHRING
Justice.

March 17th, 1936.

54 *Order Sustaining Motion to Strike Objections and
Exceptions on Behalf of Wm. H. Walker*

Filed March 20 1936

* * * * *

Upon consideration of the motion of petitioner to strike the objections and exceptions herein filed on March 2, 1936 on behalf of William H. Walker, owner of Lot 808, Square 3657, to that portion of the verdict herein which relates to the said property and after argument of counsel, it is by the Court this 20th. day of March, 1936,

ORDERED, that said motion to strike be and it hereby is sustained.

O R LUHRING
Justice.

Exception noted
LUHRING—J

*Order Striking Objections and Exceptions Filed by Eliza-
beth G. and Charles W. Hailer, &c.*

Filed March 20 1936

* * * * *

This cause coming on to be heard on the 12th day of March, 1936, on motion filed by the Petitioners to Strike objections and exceptions filed herein by Elizabeth G. and Charles W. Hailer, after hearing by the Court and argument of counsel, it is by the Court, this 20th day of March, 1936, ORDERED:

That the said motion to strike be, and same hereby is sustained.

By the Court:

O R LUHRING
Justice.

Exception noted
LUHRING J

- 55 *Order Sustaining Motion to Strike Objections and Exceptions to Verdict as to Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78 and 133/80.*

Filed March 20 1936

* * * * *

Upon consideration of motion of petitioner to strike the objections and exceptions, filed herein March 2, 1936, by owners of Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78 and 133/80, as to so much of the verdict herein as relates to said Parcels, and, after argument of counsel, it is, by the Court, this 20th day of March, 1936, ORDERED that said motion to strike be, and it is hereby, sustained.

By the Court:

O R LUHRING
Justice.

Exception noted
LUHRING J.

- 56 *Order Ratifying and Confirming Verdict Except as to Parcels 133/43, 133/47, 133/51, 133/54, 133/57 and 133/79.*

Filed March 20 1936

* * * * *

On motion of the Commissioners of the District of Columbia, petitioners herein, by their counsel, it is by the Court this 20th day of March, 1936,

ORDERED: That the said verdict and awards be, and the same are hereby in all respects finally ratified and confirmed with the exception of awards to Parcels 133/43, 133/47, 133/51, 133/54, 133/57 and 133/79, as to which further orders will be made.

And it is further Adjudged, Ordered and Decreed, that upon the payment of the said several awards to the parties thereto entitled, or into the registry of the Court, in accordance with the provisions of Section 491n of the Code of Law for the District of Columbia, the several pieces or parcels of land mentioned and described in said verdict shall become and be the property of the District of Colum-

bia for the purpose for which this proceeding was instituted.

By the Court:

O R LUHRING

Justice.

From the foregoing decree, the owners of Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80 (all in one ownership) hereby appeal in open Court to the U. S. Court of Appeals D. C., and the bond for costs on such appeal is hereby fixed at \$100 covering all of said parcels, or a cash deposit of \$50 in lieu. Appeal also noted on behalf of owners of Lots 6 and 809, Square 3657, bond or deposit in same amount fixed. Appeal also noted on behalf of owner of Lot 808, Square 3657, bond or deposit in same amount fixed. Appeal also noted on behalf of owners of parcels 134/45 and 134/46, bond or deposit in same amount.

O R LUHRING

Justice.

Memoranda

APRIL 9—1936.

Time to file Bills of Exceptions or Statements of Evidence respecting Lot 808, Square 3657, Lots 6 and 809, Square 3657, and Parcels 133/20, &c. extended to and including April 27, 1936.

APRIL 11—1936.

\$50 deposited by Wm. H. Walker in lieu of bond on appeal.

Undertaking on appeal of Elizabeth G. Hailer, et al. for \$100 approved and filed.

APRIL 13—1936.

\$50 deposit by George E. Sullivan for Wm. K. Wimsatt, Herman M. Grimes and Robert C. Wimsatt, trustees, in lieu of bond on appeal.

APRIL 27—1936.

Proposed Bills of Exceptions respecting Lot 808, Square 3657, Lots 6 and 809, Square 3657, and Parcels 133/20, &c., filed.

58 *Assignment of Errors on Behalf of William H. Walker*

Filed April 28 1936

* * * * * * * *

Appellant, William H. Walker, owner of Lot 808, Square 3657, respectfully assigns as errors of the Court the following:

1. Refusing to instruct the jury as requested, that in determining both damages and benefits the jury should consider the fact that the purpose of the proceeding is to entirely eliminate any crossing at grade over the railroad at Bunker Hill Road or Michigan Avenue.

2. Refusing to instruct the jury as requested, that in determining both damages and benefits the jury should consider the fact that Bunker Hill Road or Michigan Avenue is to be barricaded, or closed in some other way, at the grade crossing over the railroad.

3. Ruling that the proceeding does not involve or include a closing of Bunker Hill Road (and Michigan Avenue) against future crossing of the railroad at grade.

4. Refusing to instruct the jury as requested, as to private ownership of bed of Bunker Hill Road (and Michigan Avenue) and the existence of private rights of way therein.

5. Ruling that the public right of way over Bunker Hill Road (and Michigan Avenue), without fee simple title in the public authorities to the bed of the road, confers upon such authorities the right to effect such closing without payment of damages.

6. Refusing to instruct the jury as requested, that the public right of way over Bunker Hill Road (and Michigan Avenue) conferred no right in the public authorities to place a complete or partial obstruction of any kind in the bed of the Road, such as the proposed viaduct is, without payment of damages to the private rights affected thereby.

7. Instructing the jury that no damage should be
59 awarded for the proposed barricade of the grade
crossing at Bunker Hill Road and Michigan Avenue.

8. Instructing the jury that no damage should be awarded
for diversion of traffic.

9. Instructing the jury that no damage should be awarded
for the viaduct except insofar as change of grade caused
by the viaduct and approaches affects values or causes
damages.

10. Refusing to instruct the jury as requested, that dam-
ages should be awarded resulting from changes in situa-
tions and topographical conditions caused by the contem-
plated project, including diversion of traffic and the erec-
tion of the viaduct.

11. Refusing to sustain objection made, that no authority
of law existed for injecting into this proceeding any low-
level roadway outside the lines of the viaduct.

12. Holding that the objections and exceptions filed
March 2, 1936 on behalf of William H. Walker were not
filed in time, and, on such erroneous supposition, granting
motion to strike same.

13. Entering final judgment, confirming verdict, as to
Lot 808, Square 3657.

CLEPHANE & LATIMER
GILBERT L. HALL

By GILBERT L. HALL,
*Attorneys for Appellant
William H. Walker*

60 *Assignment of Errors on Behalf of Elizabeth G. &
Chas. W. Hailer*

Filed April 28 1936

* * * * *

Appellants, Elizabeth G. Hailer and Charles W. Hailer,
respectfully assign as errors of the Court the following:

1. In refusing to instruct the jury as requested, that in
determining both damages and benefits the jury shall con-
sider the fact that the purpose of the proceeding is to en-
tirely eliminate any crossing at grade over the railroad at
Bunker Hill Road or Michigan Avenue.

2. In refusing to instruct the jury as requested, that in determining both damages and benefits the jury shall consider the fact that Bunker Hill Road or Michigan Avenue is to be barricaded, or closed in some other way, at the grade crossing over the railroad.

3. In ruling that the proceeding does not involve or include a closing of Bunker Hill Road (and Michigan Avenue) against future crossing of the railroad at grade.

4. In refusing to instruct the jury as requested, as to private ownership of bed of Bunker Hill Road (and Michigan Avenue) and the existence of private rights of way therein.

5. In ruling that the public right of way over Bunker Hill Road (and Michigan Avenue), without fee simple title in the public authorities to the bed of the road, confers upon such authorities the right to effect such closing without payment of damages.

6. In refusing to instruct the jury as requested, that the public right of way over Bunker Hill Road (and Michigan Avenue) conferred no right in the public authorities to place a complete or partial obstruction of any kind in the bed of the road, such as the proposed viaduct is, without payment of damages to the private rights affected.

7. In instructing the jury that no damage should
61 be awarded for the proposed barricade of the grade crossing at Bunker Hill Road and Michigan Avenue.

8. In instructing the jury that no damage should be awarded for diversion of traffic.

9. In instructing the jury that no damage should be awarded for the viaduct except insofar as change of grade caused by the viaduct and approaches affects values or causes damages.

10. In refusing to instruct the jury as requested, that damages should be awarded resulting from change in situations and topographical conditions caused by the contemplated project, including diversion of traffic, and the erection of the viaduct.

11. In refusing to sustain objection made, that no authority of law existed for injecting into this proceeding any low-level roadway outside the lines of the viaduct.

12. In holding that the objections and exceptions filed

March 2, 1936 were not filed in time, and, on such erroneous supposition, granting motion to strike same.

13. In entering final judgment, confirming verdict, as to Lot 6 Square 3657.

14. In entering final judgment, confirming verdict, as to Lot 809 Square 3657.

FRANK VAN SANT

*Attorney for Appellants,
Elizabeth G. Hailer and
Charles W. Hailer*

62 *Assignment of Errors on Behalf of Wm. K. Wimsatt,
Herman M. Grimes and Robert C. Wimsatt, Trustees.*

Filed April 28 1936

* * * * * * * *

Appellants, William K. Wimsatt, Herman M. Grimes and Robert C. Wimsatt, Trustees under Will of William A. Wimsatt, deceased, respectfully assign as errors of the Court the following:

1. In refusing to instruct the jury as requested, that in determining both damages and benefits the jury shall consider the fact that the purpose of the proceeding is to entirely eliminate any crossing at grade over the railroad at Bunker Hill Road or Michigan Avenue.

2. In refusing to instruct the jury as requested, that in determining both damages and benefits the jury shall consider the fact that Bunker Hill Road or Michigan Avenue is to be barricaded, or closed in some other way, at the grade crossing over the railroad.

3. In ruling that the proceeding does not involve or include a closing of Bunker Hill Road (and Michigan Avenue) against future crossing of the railroad at grade.

4. In refusing to instruct the jury as requested, as to private ownership of bed of Bunker Hill Road (and Michigan Avenue) and the existence of private rights of way therein.

5. In ruling that the public right of way over Bunker Hill Road (and Michigan Avenue), without fee simple title in the public authorities to the bed of the road, confers upon

such authorities the right to effect such closing without payment of damages.

6. In refusing to instruct the jury as requested, that the public right of way over Bunker Hill Road (and Michigan Avenue) conferred no right in the public authorities to place a complete or partial obstruction of any kind in the bed of the Road, such as the proposed viaduct is,
63 without payment of damages to the private rights affected.

7. In instructing the jury that no damage should be awarded for the proposed barricade of the grade crossing at Bunker Hill Road and Michigan Avenue.

8. In instructing the jury that no damage should be awarded for diversion of traffic.

9. In instructing the jury that no damage should be awarded for the viaduct except insofar as change of grade caused by the viaduct and approaches affects values or causes damages.

10. In refusing to instruct the jury as requested, that damages should be awarded resulting from change in situations and topographical conditions caused by the contemplated project, including diversion of traffic and the erection of the viaduct.

11. In refusing to instruct the jury as requested, that the 14 foot strip on the south side of the viaduct cannot be considered by them as subject to travel or use by adjoining property owners.

12. In refusing to sustain objection made, that no authority of law existed for injecting into this proceeding any low-level roadway outside the lines of the viaduct.

13. In holding that the objections and exceptions filed March 2, 1936 were not filed in time, and, on such erroneous supposition, granting motion to strike same.

14. In entering final judgment, confirming verdict, as to Parcel 133/20.

15. In entering final judgment, confirming verdict, as to Parcel 133/50.

16. In entering final judgment, confirming verdict, as to Parcel 133/60.

17. In entering final judgment, confirming verdict, as to Parcel 133/62.

18. In entering final judgment, confirming verdict,
64 as to Parcel 133/71.

19. In entering final judgment, confirming verdict,
as to Parcel 133/78.

20. In entering final judgment, confirming verdict, as to
Parcel 133/80.

GEO. E. SULLIVAN

*Attorney for Appellants,
William K. Wimsatt, Her-
man M. Grimes and Robert
C. Wimsatt, Trustees under
Will of William A. Wimsatt,
deceased.*

Memorandum

MAY 28—1936.

Bills of Exceptions respecting Lot 808, Square 3657, Lots
6 and 809, Square 3657, and Parcels 133/20, &c.—submitted.

District Court of the United States for the District of
Columbia

Thursday, July 2, 1936

The Court resumes its session pursuant to adjournment,
Mr. Justice Luhring, presiding.

* * * * *

Come now the parties hereto by their respective attor-
neys of record, and thereupon, the owners of Lot 808,
Square 3657, Lots 6 and 809, Square 3657, and Parcels
133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80,
by their attorneys, present to the Court their Bill of Ex-
ceptions taken at the trial of this cause any pray that the
same be signed and made of record, nunc pro tunc, which
is hereby accordingly done.

O. R. LUHRING,
Justice.

65 *Order Authorizing Single Transcript of Record Covering Appeals*

Filed July 11 1936

* * * * *

It is, by the Court, this 11th day of July, 1936, ADJUDGED AND ORDERED, that a single transcript of record be, and the same is hereby, authorized covering the appeals taken and perfected herein respecting Lot 808, Square 3657, Lots 6 and 809 in Square 3657, and Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80.

JESSE C ADKINS
Justice.

Consented to:

GILBERT L. HALL—
FRANK VAN SANT
GEO. E. SULLIVAN

Attorneys for respective appellants concerned.

WALTER L FOWLER
Attorney for appellees.

*Designation of Record on Appeal Respecting Lot 808,
Square 3657.*

Filed April 27 1936

* * * * *

The Clerk will please prepare a transcript of record on the pending appeal respecting Lot 808, Square 3657 in this proceeding to include the following:

1. Petition and exhibit filed July 8, 1935.
2. Amendment to petition and exhibit filed October 28, 1935.
3. Instructions to jury filed December 17, 1935.
4. Verdict of jury filed February 10, 1936 with respect to Lot 808, Square 3657.
5. Objections and exceptions filed March 2, 1936
- 66 to such portion of said verdict.
6. Motion filed March 4, 1936 to strike said objections and exceptions.

7. Opinion of Court filed March 17, 1936.

8. Order entered March 20, 1936 sustaining said motion to strike; exception noted.

9. Final judgment entered March 20, 1936 confirming verdict of jury as to Lot 808, Square 3657; appeal noted, and undertaking fixed at \$100 or cash deposit of \$50 in lieu thereof.

10. Memo of orders extending time for filing Bill of Exceptions on appeal, respecting said Lot, to and including April 27, 1936.

11. Memo of cash deposit of \$50 made April 11, 1936 to perfect appeal respecting said Lot.

12. Memo of dates of filing, submission and settlement or approval of Bill of Exceptions.

13. Assignment of errors.

14. This designation.

CLEPHANE & LATIMER
GILBERT L. HALL—
By GILBERT L. HALL—
*Attorneys for Appellant
William H. Walker.*

Service of copy above designation this 27th day of April, 1936—Acknowledged.

VERNON E. WEST

67 *Designation of Record on Appeal Respecting Lots 6
and 809, Square 3657.*

Filed April 27 1936

* * * * *

The Clerk will please prepare a transcript of record on the pending appeal respecting Lots 6 and 809, Square 3657, in this proceeding, to include the following:

1. Petition and exhibit filed July 8, 1935.

2. Amendment to petition and exhibit filed October 28, 1935.

3. Instructions to jury filed December 17, 1935.

4. Verdict of jury filed February 10, 1936 with respect to Lots 6 and 809, Square 3657.

5. Objections and exceptions filed March 2, 1936 to such portions of said verdict.

6. Motion filed March 4, 1936 to strike said objections and exceptions.

7. Opinion of Court filed March 17, 1936.

8. Order entered March 20, 1936 sustaining said motion to strike; exception noted.

9. Final judgment entered March 20, 1936 confirming verdict of jury as to Lots 6 and 809, Square 3657; appeal noted, and undertaking fixed at \$100 or cash deposit of \$50 in lieu thereof.

10. Memo of orders extending time for filing Bill of Exceptions on appeal, respecting said Lots, to and including April 27, 1936.

11. Memo of undertaking made April 11, 1936 to perfect appeal respecting said Lots.

12. Memo of dates of filing, submission and settlement or approval of Bill of Exceptions.

13. Assignment of errors.

68 14. This designation.

FRANK VAN SANT

*Attorney for Appellants,
Elizabeth G. Hailer and
Charles W. Hailer.*

Service of a copy hereof acknowledged this 27th day of
Apl 1936

VERNON E. WEST

*Designation of Record on Appeal Respecting Parcels
133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and
133/80.*

Filed April 27 1936

* * * * *

The Clerk will please prepare a transcript of record on the pending appeal respecting Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80 in this proceeding, to include the following:

1. Petition and exhibit filed July 8, 1935.

2. Amendment to petition and exhibit filed October 28, 1935.

3. Instructions to jury filed December 17, 1935.
4. Verdict of jury filed February 10, 1936 with respect to Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80.
5. Objections and exceptions filed March 2, 1936 to such portions of said verdict.
6. Motion filed March 4, 1936 to strike said objections and exceptions.
7. Opinion of Court filed March 17, 1936.
8. Order entered March 20, 1936 sustaining said motion to strike; exception noted.
9. Final judgment entered March 20, 1936 confirming
69 ing verdict of jury as to Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80; appeal noted, and undertaking fixed at \$100 or cash deposit of \$50 in lieu thereof.
10. Memo of orders extending time for filing Bill of Exceptions on appeal, respecting said Parcels, to and including April 27, 1936.
11. Memo of cash deposit of \$50 made April 13, 1936 to perfect appeal respecting said Parcels.
12. Memo of dates of filing, submission and settlement or approval of Bill of Exceptions.
13. Assignment of errors.
14. This designation.

GEO. E. SULLIVAN

*Attorney for Appellants,
William K. Wimsatt, Her-
man M. Grimes, and Robert
C. Wimsatt, Trustees under
Will of William A. Wimsatt,
deceased.*

Copy acknowledged this 27th day of April 1936.

VERNON E. WEST

Atty. for Petitioners.

*Additional Designation of Record on Appeal Respecting
Lots 6 and 809, in Square 3657.*

Filed April 29 1936

* * * * *

The Clerk will include in addition to respondents' designation the following, as part of the record on appeal to the Court of Appeals:

1. Verdict of Jury in its entirety.
2. Order of Citation and Publication, filed July 8, 1935.
3. Certificate of Marshal, entitled, "List of Parties to be Served by Marshal".
4. Proofs of Publication.
5. Order Appointing Jury and Directing Jurors to View Land, filed October 8, 1935.
6. "Certificate of Inspection", signed by members of the Jury.
7. This designation.

VERNON E. WEST
WALTER L FOWLER

Attorneys for Petitioners.

Service acknowledged this 29 day of April, 1936.

FRANK VAN SANT

Attorney for Respondents.

*Additional Designation of Record on Appeal Respecting
Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78
and 133/80.*

Filed April 29 1936

* * * * *

The Clerk will include in addition to respondents' designation, the following as part of the record on appeal to the Court of Appeals:

1. Verdict of Jury in its entirety.
2. Order of Citation and Publication filed July 8, 1935.
3. Certificate of Marshal entitled "List of Parties to be Served by Marshal".
4. Proofs of Publication.
5. Memo. appearance for owners Parcels 133/20 etc.

6. Order Appointing Jury and Directing Jurors to View Land, filed October 8, 1935.

7. "Certificate of Inspection", signed by members of the jury.

71 8. This designation.

VERNON E. WEST
WALTER L FOWLER

Attorneys for Petitioners.

Service acknowledged this 29th day of April, 1936.

GEO. E. SULLIVAN

Attorney for Respondents.

*Additional Designation of Record on Appeal Respecting
Lot 808 in Square 3657*

Filed April 29 1936

* * * * *

The clerk will include in addition to respondents' designation the following, as part of the record on appeal to the Court of Appeals:

1. Verdict of Jury in its entirety.

2. Order of Citation and Publication, filed July 8, 1935.

3. Certificate of Marshal, entitled, "List of Parties to be served by Marshal".

4. Proofs of Publication.

5. Order Appointing Jury and Directing Jurors to View Land, filed October 8, 1935.

6. "Certificate of Inspection", signed by members of the Jury.

7. This designation.

VERNON E. WEST
WALTER L FOWLER

Attorneys for Petitioners.

Service acknowledged this 29th day of April, 1936.

CLEPHANE & LATIMER
GILBERT L. HALL,

Attorneys for Respondents.

72 District Court of the United States for the District
of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 71, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause entitled In Re: Condemnation of land for the Michigan Avenue viaduct and approaches, including the widening of 10th Street at Michigan Avenue, Northeast, and the proposed reservation at the intersection of Michigan Avenue and 10th Street, Northeast, in the District of Columbia, District Court 2352, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 25th day of July, 1936.

C. E. STEWART,
Clerk.

(Seal)

73 Endorsed: United States Court of Appeals for the District of Columbia. Filed Jul 27 1936. Moncure Burke, Clerk. Filed Jul 2 1936.

In the District Court of the United States for the District
of Columbia.

District Court

No. 2352.

In Re: Condemnation of Land for the Michigan Avenue
Viaduct and Approaches, Etc.

Bill of Exceptions on Appeals Respecting Lot 808, Square 3657, Lots 6 and 809, Square 3657, and Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78 and 133/80.

Be it remembered that this cause came on to be tried before Mr. Justice Oscar R. Luhring and a jury, on the 28th day of October 1935, Walter L. Fowler, Esquire, appearing for the petitioners, Gilbert L. Hall, Esquire, ap-

pearing for owner of Lot 808, Square 3657, Frank Van Sant, Esquire, appearing for owners of Lots 6 and 809, Square 3657, George E. Sullivan, Esquire, appearing for owners of Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80, and owners of various other Lots and Parcels not specifically dealt with in this bill of exceptions being represented by other attorneys, whereupon the following proceedings were had, as regards such specifically mentioned Lots and Parcels:

Petitioners produced in evidence order of the Commissioners of the District of Columbia of June 25, 1935, authorizing and directing these condemnation proceedings, and also map or plat approved in and annexed to said order, identical with map or plat annexed to the original petition filed in this cause, said order reading as follows:

"ORDERED:

That pursuant to the authority conferred upon the Commissioners of the District of Columbia by the Act of Congress approved February 12, 1931 (Public Act No. 618, 71st Congress), to construct a viaduct and approaches to eliminate the present Michigan Avenue grade crossing in the District of Columbia, the Corporation Counsel is hereby directed to institute condemnation proceedings in accordance with the provisions of Chapter XV of the Code
74 of Law for the District of Columbia, as amended, for the acquisition of land necessary for this project, including the widening of 10th Street at Michigan Avenue, N. E., and the proposed reservation at the intersection of Michigan Avenue and 10th Street, N. E., as shown in green on plat designated 'Condemnation of Land for the Michigan Avenue Viaduct' (Street Extension No. 1401, dated June 12, 1935)."

and further adduced evidence as to the correctness of the dimensions and areas of lots and parcels, and portions thereof, to be condemned, and of the locations of structures and improvements upon same, as shown and stated on said map or plat.

Petitioners also produced in evidence further order of said Commissioners of November 1, 1935 approving "the grades as shown on profile and treatment plat dated October 21, 1935," and also approving "the treatment plan for Michigan Avenue between 7th Street, Northeast, and 10th

Street, Northeast, as shown on said plat," and further produced in evidence the said plat, identical with plat filed herein October 28, 1935 with, and constituting part of, amendment then made to the original petition, said order reading as follows:

"ORDERED:

That, pursuant to the authority conferred upon the Commissioners of the District of Columbia, by the Act of Congress approved February 12, 1931 (Public Act No. 618, 71st Congress) condemnation proceedings have been instituted in accordance with the provisions of Chapter XV of the Code of Laws for the District of Columbia, as amended, for the acquisition of land necessary for the Michigan Avenue Viaduct, and the Commissioners hereby approve the grades as shown on profile and treatment plat dated October 21, 1935, and hereby approve the treatment plan for Michigan Avenue between 7th Street, Northeast, and 10th Street, Northeast, as shown on said plat."

Counsel for petitioners announced that this last-
75 named plat shows "the plan that will be put in effect when this land is acquired". Objections were made, on behalf of owners of Lot 808, Square 3657, Lots 6 and 809, Square 3657, and Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80, respectively, that there was no authority of law to condemn land to lay out any low-level roadway as shown on said plat outside the lines of the viaduct, but such objections were overruled by the Court, and exceptions duly noted and entered upon the Minutes of the Court. Petitioners thereupon adduced testimony explanatory of, and supplementing, said profile and treatment plat, as follows:

(1) The figures in red within a red circle denote the difference in elevation between the roadway of the proposed overpass and the existing surface of the land.

(2) The figures shown in yellow denote the difference in elevation between the grade of the proposed low-level roadways and the existing surface of the land, "F" denoting fill, and "C" cut.

(3) The proposed 17 foot low-level roadway to the west of the railroad will not cross the railroad, but "a turn around" 35 feet in diameter will be provided on the west side of the railroad, and said roadway will pass under the

first vent of the open viaduct structure and lead into the Railroad Station, north of the proposed viaduct.

(4) The proposed 18 foot low-level roadway on the east side of the railroad will continue along the entire northern side of the viaduct to a point approximately 40 feet east of the railroad.

(5) The 14 foot open space or strip along the south side of the viaduct is necessary to be left for purpose of construction and also for access for repairs, inspection and drainage purposes; and 14 feet of the width of the 18 foot low-level roadway is likewise necessary for such purposes.

76 (6) An open space will be left under the viaduct at the point shown on the plat for underpass of existing 20 foot roadway located on the east side of the railroad, and running parallel with said railroad, and the communication of said roadway with Bunker Hill Road will be maintained by making the portion thereof within the condemnation lines available and usable for highway purposes out to Bunker Hill Road.

(7) There will be a reinforced concrete parapet wall two feet thick on each side of the viaduct and projecting four feet above the floor of the viaduct, but the design of the balustrade has not been completed, nor has the size and design of the pillars to be used in the open-work portion of the viaduct been determined.

(8) The figure 8 on the lower or south side, adjoining the 14 foot open space represents the width in feet of the two foot parapet wall plus the width of a six foot sidewalk; the figure 10 on the upper side, adjoining the proposed 18 foot low-level roadway, includes a two foot wide low-level curb adjoining such roadway, plus the two foot width of the parapet wall, plus a six foot wide sidewalk adjoining the north parapet wall; and the figure 40 represents the width of the proposed roadway across the viaduct.

(9) With respect to the barricades indicated at two points on the plat annexed to the amendment to the petition, the Director of Highways of the District of Columbia testified:

“Q. (Mr. Fowler). Of course, Bunker Hill Road will be cut off to conform with the provisions of the Act of Congress? A. That is correct. It will be barricaded at the two points indicated.

77 Q. At the points indicated on this plat? A. Yes, sir.

Mr. Fowler: Your honor will recall, by reading the Act of Congress, that the Act provides for the closing of Bunker Hill Road."

Subsequently, counsel for petitioners announced that, notwithstanding the barricades shown on said plat, his position is that this proceeding does not itself involve any closing of the crossing of Bunker Hill Road over the railroad tracks at grade, but any such closing is an aftermatter, and that, if counsel for the property owners so desires, counsel for petitioners has no objection to such barricades being drawn off said plat. Counsel for the hereinbefore mentioned owners of Lots and Parcels, respectively, objected that there was no legal authority for such closing being treated as a separate matter not involved in this proceeding, but such objection was overruled by the trial justice, who announced that such closing must be treated as not involved in this proceeding, to which ruling exceptions were duly noted and entered upon the Minutes of the Court on behalf of said owners of Lots and Parcels, respectively. Thereupon, upon further questioning, said Director of Highways testified that the aforesaid barricades shown on said plat are merely "proposed" barricades "if and when Bunker Hill Road may be closed".

With respect to the 20 foot road shown on plat filed with the original petition, counsel for petitioners announced "we will admit that it is in private ownership", following which it was stipulated by counsel that, although in private ownership, it is a roadway over which property owners in the rear and adjacent thereto, including Parcels 133/78, 133/20, 133/60, 133/71, and 133/50, have an easement right. At this point, counsel for petitioner announced that said roadway is correctly described on the plat annexed to the original petition as being 20 feet wide, and that under
78 the treatment plan provision will be made for said roadway to that width passing under the viaduct.

Thereupon, evidence was adduced by property owners that Bunker Hill Road, including Michigan Avenue as part of it, and extending from Harewood Road at its western terminus to Queens Chapel Road at its eastern end, had been in existence as a 33-foot old county road since before

the establishment of the District of Columbia, and counsel for petitioners in open Court conceded such to be facts.

James F. Duhamel, a well known local historian, produced by property owners, testified to his familiarity with said road since the Civil War, and gave his opinion as an historian, from the facts and conditions known to him, that said road was laid out by the people in the vicinity for convenience.

Alfred B. Baker, a well known title examiner and member of the Bar in both the District of Columbia and Maryland, being produced by property owners, testified that he had investigated the origin, history and status of Bunker Hill Road, starting with patent registered in 1686 of a tract called "Turkey Thicket" patented to Charles Beall by Lord Baltimore; that the north half of said road was included in "Turkey Thicket"; that the south half was included in another tract called "Enclosure"; and that he found neither dedication nor conveyance to the public authorities of the fee title to the land occupied by said road, although he has no doubt about said road being a public highway. Counsel for petitioner objected to such testimony, on the ground that available records were not produced, which objection was overruled by the trial Justice. On cross-examination, witness stated he did not know of any streets in the District of Columbia that are owned in fee by the United States or the District of Columbia, and, upon being further asked what, if any, difference there is between Bunker Hill Road and any other street in the District of Columbia, replied: "Only that this is an ancient road, and an ancient road coming to the District of
79 Columbia, under the law of Maryland, leaves the fee simple title always in the abutting property owners."

Witness added that it is his expert opinion that "even to this day, the title to Bunker Hill Road is in the adjoining property owners subject to the easement of the public".

Thereupon **W. S. Pinkus**, a witness produced by petitioner, testified that he is employed in the office of the Surveyor of the District of Columbia, and produced from the original records on file in said Office, a plat from Miscellaneous Plat Book, folio 253, showing a survey of Bunker Hill Road, from Middleton's Gate to the District Line, according to the resolution of the Levy Court on September

5, 1864, the survey being made by Carpenter who was County Surveyor of the County of Washington, which plat was offered in evidence, to which offer these property owners objected on the ground that the resolution authorizing the plat had not been produced, which objection was by the Court overruled, and to which ruling of the Court these property owners then and there noted an exception, which was by the Court allowed and duly entered upon its minutes and said plat of survey was thereupon received in evidence and marked "D. C. Exhibit No. 17", and though not physically incorporated herein is made a part of this Bill of Exceptions with leave to produce the same before the Court of Appeals on hearing. That portion of the road involved in this proceeding was pointed out by the witness as being the parts represented by the names Middleton, Talbert, Berry and Brooks and the strip between said properties.

And the witness further testified that the said plat shows the name of the road, but does not show its width or purport to show the ownership of it, but that it shows the property lines coming to the road, and thereupon counsel for these property owners moved the Court to strike out the witness' interpretation of the plat as to showing property lines, with respect to which motion the Court remarked:

"It shows that those property lines abut on the road.

80 The rule was then, and I understand it is now, that the fee of these roads is not owned by the District of Columbia."

The witness next produced a plat from Liber County 7, part of the Talbert tract, a survey by George W. Jackson, made in September, 1889, which he said showed the north line of Bunker Hill Road, and thereupon the said plat was offered in evidence, to which offer these property owners objected on the ground that it is not an official survey but merely a survey made by George W. Jackson without any showing as to whom it was made for, which objection was by the Court overruled, and to which ruling of the Court these property owners then and there noted an exception, which was by the Court allowed and duly entered upon its minutes, which plat, although not physically incorporated herein is made a part hereof with leave to any party to produce the same on hearing in the Court of Appeals, and the

witness stated that the plat shows the property lines running up to the north line of Bunker Hill Road, which statement of the witness these property owners moved the Court to strike out, which motion the Court overruled, and to which ruling of the Court these property owners then and there noted an exception, which was by the Court allowed and duly entered upon its minutes, and the witness stated the title of the plat to be "Plat of a part of the late George Talbert's land situated in the county of Washington, District of Columbia, on the north side of Bunker Hill Road opposite Brookland, laid down by scale of 50 feet to 1 inch, by George W. Jackson, C. E., September, 1889", and he stated that the said plat shows a Levy Court stone at the first angle immediately west of the northeast corner.

The witness thereupon produced a plat in Book County Liber No. 6, folio 103, which he said was a subdivision of a tract into lots and squares known as Brookland, lying east and south of the south line of Bunker Hill Road, showing a widening of 15 feet to the at that time existing
81 Bunker Hill Road, and thereupon these property owners moved the Court to strike out, "showing a widening of 15 feet to the at that time existing Bunker Hill Road", because the plat means no more than that the 15 feet on that side which was in private ownership was by the plat dedicated to public use, which motion was by the Court overruled, and to which ruling of the Court these property owners then and there noted an exception, which was by the Court allowed and duly entered upon its minutes, and the witness stated that the words "Bunker Hill Road", are not on this map, and that the only language on the plat from which he drew the contention of the dedication of a 15-foot strip is the following: "We hereby subdivide a tract of land known as part of Enclosure hereafter to be known as Brookland in the District of Columbia as shown on the foregoing plat", and thereupon the said plat was offered and received in evidence, which plat although not physically incorporated herein is made a part hereof, with leave of any party to produce the same on hearing in the Court of Appeals.

And thereupon the witness produced a further plat which he described as a dedication of an additional 15-foot widening on both sides of Bunker Hill Road between Lincoln

Road and the railroad right-of-way, in which the Catholic University of America joined, the dedication being made in the following language: "We, the undersigned owners of the land of which 'Bunker Hill Road' widened as hereon shown (tinted), is comprised, hereby dedicate the same as part of the said Road subject to the same jurisdiction and control of the authorities of the District of Columbia in all respects as the said 'Bunker Hill Road' as it now exists," and the said plat was offered and received in evidence, which plat although not physically incorporated herein is made a part hereof with leave to any party to produce the same on hearing in the Court of Appeals, the said plat being dated September 20, 1893.

82 And thereupon the witness produced a further plat which he described as showing an additional widening on the north side between Harewood Road and Brookland Avenue of a 6½ foot strip through the Catholic University property, in the following language: "We, the undersigned owners of all the land shown in red, hereby dedicate the same to the District for the widening of Michigan Avenue", but the plat as recorded only included the widening on the north and not the south side of Michigan Avenue though property on the south side was shown in red, the said plat being dated December 30, 1930, which plat although not physically incorporated herein is made a part hereof with leave to any party to produce the same on hearing in the Court of Appeals.

The four plats last mentioned were marked respectively "D. C. Exhibit" 18, 19, 20 and 21 and all were produced from the records of the Office of the Surveyor of the District of Columbia. He also presented a report of the Superintendent of County Roads, marked "D. C. Exhibit No. 23, produced from the records of the Office of the Surveyor of the District of Columbia which were offered and received in evidence. Witness identified Street Extension Book Section 2, pages 33 and 34, showing the Plan of the Permanent System of Highways and he identified the amendment thereto which were both offered and received in evidence and markd "D. C. Exhibit No. 23-A"; which exhibits though not physically incorporated herein are hereby made a part of this Bill of Exceptions with leave to either party to produce the same before the Court of Appeals on hearing.

At the conclusion of such evidence relating to the history and status of Bunker Hill Road, the trial Justice ruled that all evidence on damages in this proceeding must exclude consideration of any contemplated or intended closing of Bunker Hill Road at or near its intersection with the railroad at grade, the grounds stated for such ruling being

83 (1) that such closing will be an after-matter not involved in this proceeding, and (2) that it is not material to this proceeding whether the public easement in Bunker Hill Road is or is not coupled with fee title to the bed of the road or whether such title is in the abutting owners, the trial Justice adding:

“I do not know that I will sign any finding, because the matters occur as we go along in connection with the questioning of the witnesses. The road we are speaking about is a public highway; there is no doubt about that. I see no necessity of making a finding and determining right now whether that road is owned to the center in fee simple by the abutting owners. I am inclined to believe that so far as this particular street is concerned the fee in the street belongs to the abutting owners. But I see no occasion to make a ruling of that sort. The matter will come up eventually when that question becomes involved. I do not see that it is involved yet. I do not see any occasion to sign a formal order on that question now. Of course you presented the matter to me in advance of hearing any testimony. It is up to the court to rule on the admission of testimony, and to know how to rule I should determine, of course, whether it is in private ownership or not, just like we excuse the jury to determine whether a confession was obtained by duress or fraud. I do not see any necessity of signing a formal order to that effect; but if it comes down to a proposition where I have got to pass on the testimony, depending upon whether this is or is not in private ownership, I am going to hold, unless I am shown to the contrary, that this is in private ownership.”

Exceptions to said ruling, and to each ground thereof, were duly noted and entered upon the Minutes of the Court, on behalf of the hereinbefore mentioned owners of Lots and Parcels, respectively, and such ruling was adhered to throughout all the evidence taken in the proceeding, and such exceptions were duly preserved to the parties, respectively, throughout the proceeding.

84

Evidence was adduced by petitioners, on the one hand, and by the owners on the hereinbefore mentioned Lots and Parcels, on the other, as to resulting damages to said respective Lots and Parcels. The damages testified to by witnesses for petitioners were substantially less, as to each of said Lots and Parcels, than the amounts awarded in the verdict returned in this proceeding. On the other hand, the amounts of damages testified to by the witnesses produced by the owners of said Lots and Parcels, respectively, were very greatly in excess of the amounts awarded in said verdict.

At the conclusion of all the evidence, the trial Justice refused to grant the following instruction to the jury requested by the hereinbefore mentioned owners of Lots and Parcels, respectively:

“The ownership of the bed of Bunker Hill Road and Michigan Avenue is in the adjoining property owners on each side, subject to a private right of way in favor of all property owners abutting on the same for the entire length thereof and also subject to a public right of way over the same.”

Exceptions to such refusal were duly noted and entered upon the Minutes of the Court on behalf of said owners, respectively, the trial Justice reiterating his earlier ruling, hereinbefore stated, that the facts recited in said prayer are not material to this proceeding. The trial Justice also refused to grant the following instruction to the jury requested by the aforesaid owners, respectively:

“The public right of way over Michigan Avenue and Bunker Hill Road does not confer upon the petitioners the right to place a complete or even partial obstruction
85 or obstructions of any kind in the bed of the same and the proposed viaduct and its approaches constitute a partial obstruction for which damages must be paid to all adjoining owners of the fee title thereto and also to all owners of a private right of way in the same, and the jury must in this proceeding determine and award such damages to all such owners.”

Exceptions to such refusal were also duly noted and entered upon the Minutes of the Court on behalf of said owners, respectively. The trial Justice did grant the following instruction to the jury, requested by petitioners:

"The jury should award no damage for the proposed barricade of the grade crossing at Bunker Hill Road and Michigan Avenue, and should award no damage for diversion of traffic, and no damage for the viaduct except insofar as the jury may believe that the change of grade caused by the construction of the viaduct and approaches affects values, or causes damages."

Exceptions to the granting thereof were duly noted and entered upon the Minutes of the Court, on behalf of said owners, respectively, such exceptions being stated to be against each of the following instructions, severally and separately, (1) to award "no damage for the proposed barricade", (2) to award "no damage for diversion of traffic", and (3) to award no damage for the viaduct other than caused by change of grade.

The trial Justice further refused, at the close of the evidence, to grant the following instruction to the jury requested by the aforesaid owners, respectively:

"In determining both damages and benefits the jury shall take into consideration the fact that the purpose of this proceeding is to entirely eliminate any crossing at grade over the tracks of the B. & O. Railroad at Bunker Hill Road or Michigan Avenue."

86 Exceptions to such refusal were duly noted and entered upon the Minutes of the Court on behalf of said owners, respectively.

The trial Justice also refused, at the close of the evidence, to grant the following instruction to the jury requested by the aforesaid owners, respectively:

"In determining both damages and benefits the jury shall take into consideration the fact that Bunker Hill Road or Michigan Avenue is to be barricaded, or closed in some other way, at the grade crossing over the B. & O. Railroad tracks."

Exceptions to such refusal were duly noted and entered upon the Minutes of the Court on behalf of said owners, respectively.

The trial Justice also refused, at the close of the evidence, to grant the following instruction to the jury requested by the aforesaid owners, respectively:

"In determining the damages you shall include allowances for such as result from the contemplated project, in-

cluding diversion of traffic and the erection of the viaduct in so far as the completion of the project will cause the same and in so far as such damage results from the change in situations and topographical conditions.”

Exceptions to such refusal were duly noted and entered upon the Minutes of the Court on behalf of said owners, respectively.

The trial Justice further refused, at the close of the evidence, to grant the following instruction to the jury requested by the owners of the Parcels aforesaid:

“In determining the matter of damages and benefits, either or both as the case may be, the jury cannot consider the proposed 14-foot strip on the South side of the viaduct or the open spaces under the viaduct as subject to travel or to use by the public to any extent whatever but must regard the same as in public ownership over which
87 adjoining property owners have no control and that they will be trespassers in attempting any use or control of same for any purpose whatever.”

Exceptions to such refusal were duly noted and entered upon the Minutes of the Court on behalf of the owners of said Parcels, respectively.

The trial Justice also refused, at the close of the evidence, to grant the following instruction to the jury requested by the owners of the Parcels aforesaid:

“In determining the matter of damages and benefits, either or both as the case may be, the jury cannot consider the proposed 14-foot strip on the south side of the viaduct or the open spaces under the viaduct as subject to travel or to use by any adjoining property owner to any extent whatever but must regard the same as in public ownership over which adjoining owners have no control and that they will be trespassers in attempting any use or right of travel over same for any purpose whatever.”

Exceptions to such refusal were duly noted and entered upon the Minutes of the Court on behalf of the owners of said Parcels, respectively. During the trial, contrary viewpoints had been expressed by opposing counsel in the hearing of the jury as to the usability of said strip by owners of abutting property.

The complete instructions as given by the trial Justice to the jury are in writing, and already on file in the record of this proceeding.

WHEREFORE, for the purposes of the several appeals taken in this proceeding by William H. Walker, with respect to Lot 808, Square 3657, Elizabeth G. Haller and Charles W. Haller, with respect to Lots 6 and 809, Square 3657, and William K. Wimsatt, Herman M. Grimes, and Robert C. Wimsatt, Trustees under Will of William A. Wimsatt, deceased, with respect to Parcels 133/20, 133/50, 88 133/60, 133/62, 133/71, 133/78, and 133/80, this Bill of Exceptions has been prepared, and is, accordingly, for that purpose signed by the Court as complete and properly prepared, this 2nd day of July, 1936.

BY THE COURT:

O R LUHRING
Justice.

89 In the United States Court of Appeals
For the District of Columbia

April Terms, 1936

No. 6798

WILLIAM H. WALKER, *et al*, *Appellants*,

VS.

MELVIN C. HAZEN, *et al*, Commissioners of the District of Columbia, *Appellees*.

Appellants Designation for Printing Portions of Record.

Come now the appellants, by their attorneys, and hereby designate the following parts of the record for printing, as covering and including all portions thereof involved in the assignments of error:

The entire transcript of record and bill of exceptions filed therewith, with the exception of the following items in said transcript to be omitted because unnecessary and not relevant to the errors assigned:

Items to be omitted.

1. Order of citation and publication, filed July 8, 1935 (pp. 13-14 Trans.)

2. Certificate of Marshal entitled "List of parties to be served by Marshal" (pp 15-18 Trans.)

3. Proofs of publication (pp. 19-22 Trans.)

4. Order appointing jury and directing jurors to view land, filed October 8, 1935 (p. 24 Trans.)

5. Certificate of inspection signed by members of the jury (p. 27 Trans.)

6. The following portions of verdict of jury, filed Feb. 10, 1936:

(a) Item headed "Part of Lot 7" (pp 34-35 Trans.)

(b) All items on page 35 of Transcript.

90 (c) Item headed "Part of tract of land taxed as Parcel 133/27" (p. 36 Trans.)

(d) Item headed "Part of tract of land taxed as Parcel 133/26" (p. 36 Trans.)

(e) Item headed "Part of tract of land taxed as Parcel 133/13" (p. 37 Trans.)

(f) Item headed "Part of tract of land taxed as Parcel 133/59" (p. 38 Trans.)

(g) Item headed "Part of tract of land taxed as Parcel 133/54" (p. 38 Trans.)

(h) Item headed "Part of tract of land taxed as Parcel 133/70" (p. 38 Trans.)

(i) Item headed "Part of tract of land taxed as Parcel 133/43" (p. 39 Trans.)

(j) Item headed "Part of tract of land taxed as Parcel 133/49" (p. 39 Trans.)

(k) Item headed "All of the tract of land taxed as Parcel 133/79" (p. 40 Trans.)

(l) Item headed "Part of a tract of land taxed as Parcel 133/51" (p. 40 Trans.)

(m) Item headed "Part of a tract of land taxed as Parcel 133/51" (p. 40 Trans.)

(m) Item headed "Part of a tract of land taxed as Parcel 133/47" (p. 40 Trans.)

(n) Item headed "Part of a tract of land taxed as Parcel 133/57" (p. 40 Trans.)

(o) Item headed "Part of a tract of land taxed as Parcel 134/46" (p. 40 Trans.)

(p) Items (1) and (2) headed "Part of a tract of land taxed as Parcel 134/45" (p. 41 Trans.)

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Service of the foregoing Designation for Printing acknowledged this 1st day of August, 1936.

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United States Court of Appeals
for the District of Columbia

October Term, 1936.

No. 6798

WILLIAM H. WALKER, ELIZABETH G. HAILER AND
CHARLES W. HAILER, AND WILLIAM K. WIMSATT,
HERMAN M. GRIMES, AND ROBERT C. WIMSATT,
Trustees under the will of WILLIAM A. WIMSATT,
Deceased,

Appellants,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN, AND DANIEL I.
SULTAN, Commissioners of the District of Colum-
bia,

Appellees.

BRIEF FOR APPELLANTS

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SATT, HERMAN M. GRIMES, and ROBERT C.
WIMSATT, Trustees under Will of WILLIAM A.
WIMSATT, deceased.*

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United States Court of Appeals for the District of Columbia

October Term, 1936.

No. 6798

WILLIAM H. WALKER, ELIZABETH G. HAILER AND
CHARLES W. HAILER, AND WILLIAM K. WIMSATT,
HERMAN M. GRIMES, AND ROBERT C. WIMSATT,
Trustees under the will of WILLIAM A. WIMSATT,
Deceased,

Appellants,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN, AND DANIEL I.
SULTAN, Commissioners of the District of Colum-
bia,

Appellees.

BRIEF FOR APPELLANTS

I.

STATEMENT OF THE CASE

This is a general appeal from final judgment entered March 20, 1936 (R. 41-2) by the District Court of the United States for the District of Columbia (then Supreme Court of the District of Columbia) in condemnation proceeding instituted July 8, 1935 by appellees acting for the District of Columbia,

to acquire land needed "for the elimination of the Michigan Avenue Grade Crossing," such acquisition and elimination being provided for in certain Acts of Congress. This appeal involves certain questions of law raised below, and decided there adversely to appellants, bearing upon the just compensation to which appellants are entitled as owners of land being taken in said proceeding.

Although appellants are divided into three separate ownership groups, the questions of law raised are almost identical as to each group. Appellant William H. Walker is interested in such questions as owner of Lot 808, Square 3657, appellant Elizabeth G. Hailer and Charles W. Hailer as owners of Lots 6, and 809, Square 3657, and appellants William K. Wimsatt, Herman M. Grimes, and Robert C. Wimsatt, Trustees under Will of William A. Wimsett, deceased, as owners of Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78, and 133/80,—parts of all of which Lots and Parcels are taken in said condemnation proceeding, as will appear from "Exhibit, D. C. No. 1" annexed to original petition (R. 15). Each of said *Lots* abuts on the *south side* of said Michigan Avenue (Bunker Hill Road) to the west of said Grade Crossing, and said *Parcels* constitute a group in one ownership having a frontage or outlet on the *north side* of said Michigan Avenue (Bunker Hill Road) to the east of said Grade Crossing. Before the condemnation, said Michigan Avenue (Bunker Hill Road) was a main and important artery of through traffic into, from,

and within the District of Columbia actually abutting such Lots and Parcels. After the condemnation, due to the elimination of the Grade Crossing, which is the essential purpose and main requirement of the law, the existing portion of said Avenue or Road, on which appellants' properties now abut, will become a "dead-end" (rather than a through) highway abutting remaining portions of appellants' said properties not taken in said proceeding.

1. Legislation for Closing of Michigan Avenue Grade Crossing.

On March 3, 1927 there was approved an Act of Congress entitled "*An Act to provide for the elimination of the Michigan Avenue grade crossing in the District of Columbia and for other purposes*" (44 Stat. L. 1351). That Act provided for a viaduct to be built over the tracks of the Baltimore & Ohio Railroad Company at Michigan Avenue. Section IV of that Act provided "*that from and after the completion of the said viaduct and approaches, the highway grade crossing over the tracks and the right-of-way of the said Baltimore & Ohio Railroad Company at Michigan Avenue in the District of Columbia shall be forever closed against further traffic of any kind.*"

Said Act was amended by the Act of February 12, 1931 (46 Stat. L. 1087). In section I of the latter Act it is provided: "*That the Commissioners of the District of Columbia be and they are hereby authorized and directed to construct a viaduct and ap-*

proaches to eliminate the present crossing at grade of Michigan Avenue and the tracks and right-of-way of the Baltimore & Ohio Railroad Company." And Section IV of the Act reiterates the aforesaid mandatory provision in the Original Act, as follows: "*That from and after the completion of the said viaduct and approaches the highway grade crossing over the tracks and right-of-way of the said Baltimore & Ohio Railroad Company at Michigan Avenue shall be forever closed against further traffic of any kind.*"

2. Condemnors' Pleadings Recognizing Statutory Purpose to Close Michigan Avenue Grade Crossing.

To carry out the provisions of the Act of February 12, 1931, the Commissioners of the District of Columbia, on July 8, 1935, filed in the Supreme Court of the District of Columbia a petition for the condemnation of various lots and parcels of land necessary for the project, and, among others, certain land owned by these appellants (R. 1).

Said petition averred: "1. That they are the Commissioners of the District of Columbia and file this petition for the purpose of acquiring land for the Michigan Avenue viaduct and approaches thereto * * * *for the elimination of the present crossing at grade of Michigan Avenue and the tracks and right-of-way of the Baltimore & Ohio Railroad Company, as authorized by Act of Congress approved February 12, 1931*" (R. 1-2).

Thereafter, an amendment was filed to the peti-

tion, attached to which was a plat, later received in evidence as "D. C. Exhibit No. 2" (R. 17), showing the location of the viaduct and *barricades closing the crossing*.

3. Condemnors' Evidence Recognizing Statutory Purpose to Close Michigan Avenue Grade Crossing.

At the trial of the said cause before a judge and jury there was placed in evidence by the condemnors an order passed by the District Commissioners on June 25, 1935, stating:

"ORDERED:

That pursuant to the authority conferred upon the Commissioners of the District of Columbia by the Act of Congress approved February 12, 1931 (Public Act No. 618, 71st Congress), *to construct a viaduct and approaches to eliminate the present Michigan Avenue grade crossing in the District of Columbia, the Corporation Counsel is hereby directed to institute condemnation proceedings in accordance with the provisions of Chapter XV of the Code of Law for the District of Columbia, as amended, for the acquisition of land necessary for this project.*" (R. 56.)

A later order dated October 1, 1935, was also received in evidence, reading:

"ORDERED:

That, pursuant to the authority conferred upon the Commissioners of the District of Colum-

bia by Act of Congress approved February 12, 1931 (Public Act No. 618, 71st Congress) condemnation proceedings have been instituted in accordance with the provisions of Chapter XV of the Code of Laws for the District of Columbia, as amended, *for the acquisition of land necessary for the Michigan Avenue Viaduct, and the Commissioners hereby approve the grades as shown on profile and treatment plat dated October 21, 1935, and hereby approve the treatment plan for Michigan Avenue between 7th Street, Northeast, and 10th Street, Northeast, as shown on said plat.*" (R. 56, 57.)

The treatment plan on said plat (D. C. Exhibit #2) shows the crossing completely closed by barricades on each side of the railroad (R. 17). Referring to this plat, counsel for the condemnors stated to the court that it showed "the plan that will be put in effect when this land is acquired." (R. 57.)

Herbert C. Whitehurst, called as a witness for the condemnors, testified that he was the Director of Highways for the District of Columbia; that "Bunker Hill Road will be cut off to conform with the provisions of the Act of Congress. It will be barricaded at the two points indicated." (R. 58), (referring to D. C. Exhibit #2, R. 17).

Before the witness Whitehurst concluded his testimony, the Corporation Counsel stated to the Court "Your Honor will recall, by reading the Act of Congress, that the Act provides for the closing of Bunker Hill Road" (R. 59).

Subsequently, the Corporation Counsel sought to

change everything that had previously been ordered, both by Congress and the Commissioners, regarding the immediate closing of said grade crossing, by then stating that this proceeding "does not itself involve any closing of the crossing of Bunker Hill Road (Michigan Avenue) over the railroad tracks at grade, but any such closing is an after matter" (R. 59). Thereupon the trial Judge ruled that any closing of the crossing of Bunker Hill Road over the railroad tracks must be treated as not involved in this proceeding, to which ruling these appellants duly excepted (R. 59). Following such occurrences, the witness Whitehurst was recalled by the Corporation Counsel, and then stated "that the aforesaid barricades, shown on said plat, are merely 'proposed' barricades 'if and when Bunker Hill Road may be closed' " (R. 59).

The width of Bunker Hill Road at the point where the southernmost portion of the Wimsatt group of Parcels abuts on same is 60 feet, and a width of 50 to 80 feet is maintained where it passes the Walker and Hailer Lots (Plat R. 15). The plan approved for the project involved in this proceeding reduces to 17 feet the portion of said highway usable for access to the Walker and Hailer properties, a 17-foot low-level roadway being provided ending, at its eastern terminus, at the barricade on the west side of the railroad (R. 15, 57), and with "a reinforced concrete parapet wall two feet thick" along the north side of said low-level roadway and "projecting four feet above the floor of the viaduct" (R. 57). Consequently, with the barricades, the Avenue or Road

is made a "dead-end" highway on each side of the railroad at grade; and, without the barricades or other means complying with the Congressional mandate, traffic from the east is forced into a reduced or "bottle-neck" highway, only 17 feet wide, on the west side of the railroad.

When the Corporation Counsel offered in evidence D. C. Exhibit #2, with the statement that it was offered to show "the plan that will be put into effect when this land is acquired" (R. 57), counsel for appellants made the objection "that there was no authority of law to condemn land to lay out any low-level roadway as shown on said plat outside the lines of the viaduct," the proposed 17 foot low-level roadway west of the railroad on the south side of the viaduct, and the proposed 18-foot low-level roadway east of the railroad on the north side of the viaduct, being each specifically protested in such objection; but the trial Justice overruled said objection, and appellants duly excepted (R. 57).

In advance of the offering of any testimony as to damages on behalf of property owners, the trial Justice ruled that the witnesses and the jury must treat Michigan Avenue (Bunker Hill Road) as still open to traffic over the railroad at grade, after the completion of the project, and that, accordingly, all evidence on damages in the proceeding "must exclude consideration of any contemplated or intended closing of Bunker Hill Road at or near its intersection with the railroad at grade." Appellants duly excepted to such ruling (R. 64).

4. Ruling Below Excluding Consideration of Ownership of Michigan Avenue (Bunker Hill Road).

Before the property owners offered evidence as to resulting damages, testimony was taken regarding the title to the bed of Michigan Avenue, including Bunker Hill Road (R. 59-63). Testimony was given that the road was laid out before the establishment of the District of Columbia, by the people in the vicinity for convenience (R. 60); that the north half of the road was included in the property to the north and the south half in the property to the south and there had been neither dedication nor conveyance thereof (R. 60). And the District produced in evidence a plat showing a survey of Bunker Hill Road made in 1864 under resolution of the Levy Court (R. 60-61), but showing neither width nor ownership; a plat showing "a part of the late George Talbot's land situated in the County of Washington, District of Columbia, on the north side of Bunker Hill Road opposite Brookland * * *"; and 3 plats showing the widening at different times of the said road. At the close of the testimony regarding the ownership the trial justice held that the title was in the adjoining property owners but held further it was "not material to this proceeding whether the public easement in Bunker Hill Road is or is not coupled with fee title to the bed of the road or whether such title is in abutting owners" and added

"I do not know that I will sign any finding, because the matters occur as we go along in con-

nection with the questioning of the witnesses. The road we are speaking about is a public highway; there is no doubt about that. I see no necessity of making a finding and determining right now whether that road is owned to the center in fee simple by the abutting owners. I am inclined to believe that so far as this particular street is concerned the fee in the street belongs to the abutting owners. But I see no occasion to make a ruling of that sort. The matter will come up eventually when that question becomes involved. I do not see that it is involved yet. I do not see any occasion to sign a formal order on that question now. Of course you presented the matter to me in advance of hearing any testimony. It is up to the court to rule on the admission of testimony, and to know how to rule I should determine, of course, whether it is in private ownership or not, just like we excuse the jury to determine whether a confession was obtained by duress or fraud. I do not see any necessity of signing a formal order to that effect; but if it comes down to a proposition where I have got to pass on the testimony, depending upon whether this is or is not in private ownership, I am going to hold, unless I am shown to the contrary, that this is in private ownership." (R. 64.)

Appellants excepted to said ruling (R. 64).

5. Instructions Requested by Appellants and Denied.

The following instructions requested by all the appellants were denied by the trial Justice, and exceptions taken:

(a) "The ownership of the bed of Bunker Hill Road and Michigan Avenue is in the adjoining property owners on each side, subject to a private right of way in favor of all property owners abutting on the same for the entire length thereof and also subject to a public right of way over the same." (R. 65.)

(b) "The public right of way over Michigan Avenue and Bunker Hill Road does not confer upon the petitioners the right to place a complete or even partial obstruction or obstructions of any kind in the bed of the same and the proposed viaduct and its approaches constitute a partial obstruction for which damages must be paid to all adjoining owners of the fee title thereto and also to all owners of a private right of way in the same, and the jury must in this proceeding determine and award such damages to all such owners." (R. 65.)

(c) "In determining both damages and benefits the jury shall take into consideration the fact that the purpose of this proceeding is to entirely eliminate any crossing at grade over the tracks of the B. & O. Railroad at Bunker Hill Road or Michigan Avenue." (R. 66.)

(d) "In determining both damages and benefits the jury shall take into consideration the fact that Bunker Hill Road or Michigan Avenue is to be barricaded, or closed in some other way, at the grade crossing over the B. & O. Railroad tracks." (R. 66.)

(e) "In determining the damages you shall include allowances for such as result from the contemplated project, including diversion of traffic

and the erection of the viaduct in so far as the completion of the project will cause the same and in so far as such damage results from the change in situations and topographical conditions." (R. 66, 67.)

The following further instruction, requested in connection with the Wimsatt Parcels by the owners thereof, was also denied, and exception taken:

(f) "In determining the matter of damages and benefits, either or both as the case may be, the Jury cannot consider the proposed 14-foot strip on the south side of the viaduct or the open spaces under the viaduct as subject to travel or to use by any adjoining property owner to any extent whatever, but must regard the same as in public ownership over which adjoining property owners have no control and that they will be trespassers in attempting any use or right of travel over same for any purpose whatever." (R. 67.)

6. Instructions Given by Trial Justice.

The instructions given to the jury by the trial Justice appear in the Record at pages 20 to 24. In addition to the failure thereof to cover the foregoing instructions requested by appellants and specifically refused, said instructions covered and included a special instruction requested by condemnors, to the granting of which appellants excepted, namely:

"The jury should award no damage for the proposed barricade of the grade crossing at

Bunker Hill Road and Michigan Avenue, and should award no damage for diversion of traffic, and no damage for the viaduct except insofar as the jury may believe that the change of grade caused by the construction of the viaduct and approaches affects values, or causes damages" (R. 66).

7. Refusal of Trial Justice to Consider Injustice and Unreasonableness of Verdict.

The verdict of the jury was filed February 10, 1936 (R. 24). Thereafter, on March 2, 1936, appellants filed objections invoking the authority and duty of the trial Justice, under the statute, to determine whether said verdict should be set aside, in so far as appellants' respective Lots and Parcels are concerned, because "unjust" and "unreasonable" (R. 30-32)—constituting, in effect, motions for new trial addressed to the supervisory judgment and discretion of the trial Justice. On March 4, 1936, appellees filed motions to strike each of said objections, claiming that said objections were not filed in time (R. 33-34). On March 17, 1936, the trial Justice sustained said motions to strike (R. 40-41), holding that the intervening leap-year day, February 29, following the verdict, must be counted as a day, and that the fact that, by so counting it, the twentieth day allowed by law fell upon a *dies non* when the Court was not open, namely, Sunday, March 1, did not enable the filing of objections, having the effect of a motion for new

trial, on the following day, March 2 (R. 35-39).

Appellants excepted to such ruling (R. 40-41), and are seeking upon this appeal to correct the error of law committed by the trial Justice in this connection, in addition to the hereinbefore stated errors of law committed by him in the course of the trial.

II.

ASSIGNMENTS OF ERROR

I. Appellant William H. Walker, owner of Lot 808, Square 3657, assigned the following as errors below:

1. Refusing to instruct the jury as requested, that in determining both damages and benefits the jury should consider the fact that the purpose of the proceeding is to entirely eliminate any crossing at grade over the railroad at Bunker Hill Road or Michigan Avenue.

2. Refusing to instruct the jury as requested, that in determining both damages and benefits the jury should consider the fact that Bunker Hill Road or Michigan Avenue is to be barricaded, or closed in some other way, at the grade crossing over the railroad.

3. Ruling that the proceeding does not involve or include a closing of Bunker Hill Road (and Michigan Avenue) against future crossing of the railroad at grade.

4. Refusing to instruct the jury as requested, as to private ownership of bed of Bunker Hill Road (and Michigan Avenue) and the existence of private rights of way therein.

5. Ruling that the public right of way over Bunker Hill Road (and Michigan Avenue), without fee simple title in the public authorities to the bed of the road, confers upon such authorities the right to effect such closing without payment of damages.

6. Refusing to instruct the jury as requested, that the public right of way over Bunker Hill Road (and Michigan Avenue) conferred no right in the public authorities to place a complete or partial obstruction of any kind in the bed of the Road, such as the proposed viaduct is, without payment of damages to the private rights affected thereby.

7. Instructing the jury that no damage should be awarded for the proposed barricade of the grade crossing at Bunker Hill Road and Michigan Avenue.

8. Instructing the jury that no damage should be awarded for diversion of traffic.

9. Instructing the jury that no damage should be awarded for the viaduct except insofar as change of grade caused by the viaduct and approaches affects values or causes damages.

10. Refusing to instruct the jury as requested, that damages should be awarded resulting from changes in situations and topographical conditions

caused by the contemplated project, including diversion of traffic and the erection of the viaduct.

11. Refusing to sustain objection made, that no authority of law existed for injecting into this proceeding any low-level roadway outside the lines of the viaduct.

12. Holding that the objections and exceptions filed March 2, 1936 on behalf of William H. Walker were not filed in time, and, on such erroneous supposition, granting motion to strike same.

13. Entering final judgment, confirming verdict, as to Lot 808, Square 3657. (Rec. 43-4.)

II. Appellants Elizabeth G. and Charles W. Hailer, owners of Lots 6 and 809, Square 3657, assigned the following as errors below:

1-11. Same as appellant Walkers Nos. 1 to 11, inclusive.

12. In holding that the objections and exceptions filed March 2, 1936 were not filed in time, and, on such erroneous supposition, granting motion to strike same.

13. In entering final judgment, confirming verdict, as to Lot 6, Square 3657.

14. In entering final judgment, confirming verdict, as to Lot 809, Square 3657. (Rec. 45-6.)

III. Appellants William K. Wimsatt, Herman M. Grimes and Robert C. Wimsatt, Trustees under will

of William A. Wimsatt, deceased, as owners of Parcels 133/20, 133/50, 133/60, 133/62, 133/71, 133/78 and 133/80, assigned the following as errors below:

1-10. Same as appellant Walker's Nos. 1 to 10, inclusive.

11. In refusing to instruct the jury as requested, that the 14 foot strip on the south side of the viaduct cannot be considered by them as subject to travel or use by adjoining property owners.

12. Same as appellant Walker's No. 11.

13. In holding that the objections and exceptions filed March 2, 1936 were not filed in time, and, on such erroneous supposition, granting motion to strike same.

14. In entering final judgment, confirming verdict, as to Parcel 133/20.

15. In entering final judgment, confirming verdict, as to Parcel 133/50.

16. In entering final judgment, confirming verdict, as to Parcel 133/60.

17. In entering final judgment, confirming verdict, as to Parcel 133/62.

18. In entering final judgment, confirming verdict, as to Parcel 133/71.

19. In entering final judgment, confirming verdict, as to Parcel 133/78.

20. In entering final judgment, confirming verdict, as to Parcel 133/80.

III.

ARGUMENT

Assignments 1, 2, 3, and 7.—These four assignments of error all relate to the ruling of the trial Justice that the closing of the Michigan Avenue (Bunker Hill Road) grade crossing at the railroad was not involved in the proceeding, notwithstanding the elimination of such grade crossing was the declared purpose of Congress in the Act, which expressly required that, after the completion of the project, said grade crossing “shall be forever closed against further traffic of any kind.” The error of the trial Justice in this connection appears to be too plain to require any argument.

Assignments 4, 5, 6, 8, 9, and 10.—These six assignments of error all relate to the ruling of the trial Justice that the private ownership in fee by appellants and other abutting property owners of the bed of Bunker Hill Road, subject only to public easement therein for highway purposes, gave appellants no right to compensation for partial or complete obstruction, or diversion of traffic, at the instance of the public authorities. In a word, the trial Justice ruled that the public authorities have the same rights, under such conditions, as they have when the complete fee has been acquired by the public. No authority has been found supporting, or tending to support, such ruling, which directly contravenes the provision in the 5th Amendment to the Constitution of the United States that private property shall not be

taken for public use without just compensation. The contrary of the proposition advanced by the trial Justice, is clearly recognized in *Dana v. Rock Creek Railroad Co.*, 7 App. D. C. 482; *Story v. New York Elevated Railroad Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elevated Railroad Co.*, 104 N. Y. 268, and *Douglass v. City Council of Montgomery et al.*, 118 Ala. 599.

Assignment 11 of Walker and Hailer, and Assignment 12 of Wimsatt.—These assignments deal with the ruling of the trial Justice that the public authorities are not bound to keep strictly within the authority conferred in an eminent domain statute, but may extend such authority to include low-level roadways in addition to, and beyond the lines of, the viaduct authorized. The provision of the low-level 17-foot “dead-end” roadway on the south side of the viaduct to the west of the railroad, abutting the Walker and Hailer properties, has produced a grotesque situation never authorized by Congress, and the consequences to said appellants are aggravated by the aforesaid ruling of the trial Justice that such narrow “dead-end” roadway must be treated by the jury as if it were a through artery of traffic. Again, the provision of the low-level 18-foot roadway running along the north side of the viaduct on the east side of the railroad, is plainly beyond any authorization of Congress, and created another grotesque situation, affecting the Wimsatt Parcels. These so-called “roadways,” which are virtually nothing better than alleys, may have been very useful in deceiving the jury as

to the full extent of the dire consequences to appellants' properties, but they are, obviously, no more a part of the Michigan Avenue Project authorized by Congress than they can be said to be a part of the Permanent System of Highways of the District of Columbia. It is elementary law that condemnation statutes must be strictly construed in favor of the landowner. 20 Corpus Juris 877. *Macfarland v. Elver-son*, 32 App. D. C. 81. *Wash. R. & E. Co. v. Newman*, 41 App. D. C. 439, 444.

Assignment 11 of Wimsatt.—This assignment relates to the refusal of the trial Justice to instruct the jury, as requested by said appellant, that the 14-foot strip on the south side of the viaduct to the east of the railroad could not be considered by the jury as subject to travel or use by adjoining property owners. The condemnors had offered evidence as to the leaving of such 14-foot strip (R. 58), and "contrary viewpoints had been expressed by opposing counsel in the hearing of the jury as to the usability of said strip by owners of abutting property" (R. 67); yet the trial Justice refused to clarify the confusion thus created, and left the jury free to assume the enjoyment of special benefits by abutting property by reason of such strip. It is submitted that the trial Justice was not vested with rightful discretion to permit such a condition.

Assignments 12 of Walker and Hailer, and Assignment 13 of Wimsatt.—These assignments deal with the erroneous refusal of the trial Justice to exercise his supervisory judgment and discretion over the ver-

dict as being "unjust" or "unreasonable," in so far as appellants' respective Lots and Parcels are concerned. Such refusal resulted from the trial Justice's viewpoint that the objections filed for such purpose (and having the status and effect of motions for new trial) were filed a day late. In other words, the trial Justice held that the intervening leap-year day, February 29, following the verdict, must be counted as a day, and that the fact that, by so counting it, the twentieth day allowed by law fell upon a *dies non* when the Court was not open, namely, Sunday, March 1, did not enable the filing of objections, having the effect of a motion for new trial, on the following day, March 2, the day on which they were filed (R. 35-39). The statute permits such objections to be "filed within twenty days after the return of the appraisement to the court" (45 Stat. L. 1438). It is respectfully submitted that the trial Justice erred as to both grounds stated by him for his said ruling. As to the first ground, Title 19, Sec. 113, p. 187, D. C. Code 1929 Ed., is of controlling effect to the contrary of said ruling:

"The day increasing in the leap-year shall be accounted for one year, so that because of that day none shall be prejudiced that is impleaded, but it shall be taken and reckoned of the same month wherein it groweth; and that day, and the day next going before, shall be accounted for one day."

The language used is plainly intended to prevent

surprise or prejudice in court proceedings — “none shall be prejudiced that is impleaded,”—yet the trial Justice considered this controlling statute to be inapplicable. As to the second ground, the trial Justice appears to have misconstrued the opinion of this Honorable Court in *Shannon & Luchs Construction Co. v. Reichelderfer*, 61 App. D. C. 36. There was no holding in that case that a motion for new trial (or other pleading having the effect thereof) would not be filed in time, if the last day fell on a *dies non* and the filing took place on the next following day. The holding in that case was that the time-limit for filing such a motion had some meaning, and that a plain default, such as in that case a filing thereof 70 days after verdict, could not be sanctioned. It must be obvious that a motion for new trial stands in quite a different situation from a writ of error. The former is the last permissible step in the lower Court. The latter is the first, and jurisdictional, step in another tribunal. It is for this reason that the general rule which allows the filing on the day succeeding a *dies non* is held not to apply to writs of error. The general rule, which is clearly applicable here, is laid down in the following cases:

“Again, it must be noticed that the first day of January was Sunday, that is, a *dies non*, and power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day. So that it is a matter worthy at least of consideration whether the

power was not exercised within the very limits of time prescribed by the act." (An Act of Congress.) *Street v. United States*, 133 U. S. 299, 306.

"In the last-cited case (*Street v. United States*, 133 U. S. 299, 306) the limitation to the exercise of a statutory power was the 1st day of January. That day was Sunday, and it was held that the power could be exercised on the succeeding day. It was said by Mr. Justice Brewer, who delivered the opinion of the Court—

'It must be noticed that the 1st day of January was Sunday, that is, a *dies non*, and a power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day'."

Lamson v. Andrews, 40 App. D. C. 39, 41.

"As the ninetieth day fell on Sunday, the lands were not open to another application until Monday, the general rule being that, when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation." (Dealing with Act of Congress.) *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 55.

The Assignments of Error not specifically dealt with in the foregoing grouping, will be found to be taken care of therein, and to be included in the propositions discussed.

CONCLUSION

It is respectfully and earnestly submitted that the Court below has erred to the prejudice of these ap-

pellants, both in rulings in the course of the trial below, and in his erroneous refusal, on account of mistake of law, to exercise supervisory judgment and discretion over the jury's verdict, and that the judgment below should be reversed.

Respectfully submitted,

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JAN 19 1937

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CLERK

No. 6798

**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1936

**WILLIAM H. WALKER, ELIZABETH G. HAILER, AND
CHARLES W. HAILER, ET AL., APPELLANTS**

v.

**MELVIN C. HAZEN, GEORGE E. ALLEN AND DANIEL I.
SULTAN, COMMISSIONERS OF THE DISTRICT OF
COLUMBIA**

BRIEF ON BEHALF OF APPELLEES

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**In the United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1936

No. 6798

WILLIAM H. WALKER, ELIZABETH G. HAILER, AND
CHARLES W. HAILER, ET AL., APPELLANTS

v.

MELVIN C. HAZEN, GEORGE E. ALLEN AND DANIEL I.
SULTAN, COMMISSIONERS OF THE DISTRICT OF
COLUMBIA

BRIEF ON BEHALF OF APPELLEES

STATEMENT OF THE CASE

This is an appeal by certain property owners from an order of the District Court of the United States for the District of Columbia ratifying and confirming the verdict of the jury awarding damages for land taken in a condemnation proceeding for the acquisition of land for the erection of a viaduct over the tracks of the Baltimore and Ohio Railroad Company to eliminate the grade crossing at Michigan Avenue.

The specific authority for this improvement is found in the Act of Congress approved February 12, 1931, 46 Stat. L. 1087; D. C. Code of 1929, Supp. 2, Title 12, Sections 67-70, the material portions of which read as follows:

That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to construct a viaduct and approaches to eliminate the present crossing at grade of Michigan Avenue and the tracks and right-of-way of the Baltimore and Ohio Railroad Company, said viaduct to be constructed north of the present line of Michigan Avenue as may be determined by the Commissioners of the District of Columbia in accordance with plans and profiles of said works to be approved by the said Commissioners: * * *

* * * * *

4. That from and after the completion of the said viaduct and approaches to the highway grade crossing over the tracks and right of way of the said Baltimore and Ohio Railroad Company at Michigan Avenue shall be forever closed against further traffic of any kind.

This proceeding was instituted (R. p. 1) under the general condemnation statute for the acquisition by the District of Columbia of "sites of schoolhouses, fire or police stations, or for a right of way for sewers, or for any other municipal use authorized by Congress". Act of Congress approved

March 1, 1929, 45 Stat. L. 1437; D. C. Code of 1929, Title 25, Sections 41-50, amending Chapter XV, secs. 483-491, Code of 1901.

On February 10, 1936, the jury returned its verdict awarding damages to appellants and others for the land taken (R. p. 24). On March 2, 1936, the appellants filed their respective objections and exceptions to the verdict of the jury (R. pp. 30, 32). Motions to strike the appellants' objections and exceptions were interposed on the ground that the said objections and exceptions were not filed within the twenty days permitted by the statute (R. pp. 33, 34). In an exhaustive opinion the trial justice sustained the motions to strike (R. pp. 35, 39), and on March 20, 1936, entered orders to that effect (R. pp. 40, 41). On the same day the court also entered an order ratifying and confirming the verdict of the jury (R. p. 41), from which this appeal is taken.

ARGUMENT

I

The Court properly sustained motions to strike appellants' objections and exceptions

Appellants assign as error the action of the court in striking their objections and exceptions to the verdict of the jury. The verdict was filed on February 10, 1936, and the objections and exceptions were not filed until March 2, 1936, twenty-one days thereafter. The condemnation statute under which

this proceeding was brought provided (Code of 1929, Title 25, Sec. 46):

* * * *And Provided Further*, that the objections or exceptions to the appraisement shall be filed within twenty days after the return of the appraisement to the court: * * *

In the case of *Shannon and Luchs Construction Company v. Reichelderfer*, 61 App. D. C. 36, this court, in considering a similar provision in the statute relating to the condemnation of land for streets said:

This case can be disposed of on the single question of the failure of the appellants to file their objections and exceptions to the verdict of the jury within time. * * *

* * * * *

* * * The objections and exceptions are in the nature of a motion for a new trial, and must be filed within the time limited.

See also *Cafritz v. Hazen*, — App. D. C. —, 62 W. L. R. 642.

But appellants contend that their exceptions and objections were filed within time for two reasons: First, that the year 1936 was a leap year and that the 28th and 29th days of February must be counted as only one day, and second, that the 20th day after the filing of the verdict of the jury was a Sunday and therefore the filing of the exceptions and objections on the first succeeding business day was within time.

In support of their first contention appellants rely upon Section 113, Title 19, of the Code of 1929, which is quoted on page 21 of their brief. This section of the Code is not an Act of Congress, but is part of the ancient English statute of 21 Henry III. In denying this contention of appellants, the court below (Rec., p. 36) said:

The Gregorian calendar and mode of computation of time were adopted in England and in the English dominions throughout the world in 1752 by statute, 24 Geo. II, c. 23, 2 Minor's Inst. (4th ed.) 188. By a similar statute, this calendar has been adopted in the District of Columbia. Tit. 19, sec. 111, Code D. C.

The word year means the period in which the earth fully completes its annual orbit around the sun. This is commonly computed to be actually 365 days and 6 hours. However, at common law, a year consisted of 365 days and was so computed.

Half a year is reckoned always for 182 days in England, and a quarter of a year 91 days. When the year consists of 365 days, this is a necessary rule, in order to avoid a *fraction of a day*, and in leap-year it grows out of the Stat. *de anno bissextile*, 21 Hen. III, enacting that the intercalated day in leap-year, together with the preceding day, shall be accounted *for one day only*. 2 Minor's Inst. (4th ed.) 188. See, also, 2 Cooley's Blackstone (4th ed.) 543 and 26 Ruling Case Law 731. The Stat. 21

Hen. III is in force in the District of Columbia. Tit. 19, sec. 113, Code D. C.

Tit. 19, sec. 113, Code D. C. and its English prototype, 21 Hen. III, apply only to periods measured in years, and where the period is measured in days, the 28th and 29th of February are to be counted as two days. 62 C. J. 1009; *Helphenstine v. Vincennes National Bank*, 65 Ind. 582, 32 A. R. 86.

The compilers of the Act of 1929 did not set out in Section 113, Title 19, all of the Act of 21 Henry III. (It must be remembered that the Code of 1929 is not an Act of Congress but a mere compilation of laws which the compilers deemed to be in force in the District of Columbia.) When the entire statute is considered it becomes plain that it applies only to periods measured in years, and not to periods measured in days. It applies to cases like the following: A note is made on and dated the 29th of February, and is payable one year after date. In the absence of this statute a question would arise as to when the note matured, there being no 29th of February in the following year.

The statute of 21 Henry III, as it reads in full, is as follows:

The King unto his Justices of the Bench, Greeting: Know ye, that where within our Realm of England, it was doubted of the year and day that were wont to be assigned unto sick persons being impleaded, when and from what day in the year going before

unto another day of the year following, the year and day in leap-year ought to be taken and reckoned how long it was:

II. We therefore, willing that a conformity be observed in this behalf every where within our Realm, and to avoid all danger from such as be in plea, have provided, and by the counsel of our faithful subjects have ordained, That to take away from henceforth all doubt and ambiguity that might arise hereupon, the day increasing the leap-year shall be accounted for one year, so that because of that day none shall be prejudiced that is impleaded, but shall be taken and reckoned of the same month wherein it groweth; and that day, and the day next going before, shall be accounted for one day. And therefore we do command you, that from henceforth you do cause this to be published afore you, and be observed. Witness myself at Westminster, etc.

In the case of *Helphenstine v. Vincennes National Bank*, 65 Ind. 582, 32 Am. Rep. 86, the court, after setting out in full the statute of 21 Henry III said:

It will be seen, we think, from this statute, which we have set out in full, that it simply provides that the 28th and 29th days of February, as parts of a year which, at common law, consisted of three hundred and sixty-five days, should be accounted for one day, in computing "the year and day that were wont to be assigned unto sick persons being impleaded." The statute makes no provision

as to how the two days should be accounted, in computing a number of days, less than one year, in which they might occur; and therefore it seems to us, that the English statute, conceding it to be in force in this State whenever applicable, is not decisive of the question we are now considering.

* * * * *

Each of the 28th and 29th days of February, in the leap-year, is a day of twenty-four hours' duration; and where these two days occur in any period of days less than one year, we are clearly of the opinion, that under the law of this State, they ought to be and must be regarded and computed as two days, and not as one day, for any purpose.

In the case of *Harker v. Addis*, 4 Pa. 515, the court, in referring to the statute of 21 Henry III, said:

No doubt this statute was passed in a barbarous age to produce uniformity of time; to make all years count 365 days. Making the 28th and 29th of February every fourth or leap year count but one day.

It has no relation to the computation of time when a rule or a statute fixes a certain number of days.

It is, therefore, plain that the provision of the condemnation statute limiting to twenty days the time in which objections and exceptions may be filed to the verdict of the jury refers to twenty days of twenty-four hours each, and the time is not extended by reason of the fact that one of the days

included within the period is the 29th day of February.

Nor is the statutory period within which objections and exceptions to the verdict of the jury may be filed extended by the fact that the twentieth day was a Sunday. It is the unanimous rule of the federal courts that when an act is to be done within a time fixed by statute and the last day thereof falls upon Sunday that day will not be excluded unless a different rule for computing the time is also provided by statute.

In the case of *Covey v. Williamson*, 52 App. D. C. 289, this court was considering whether Sundays and legal holidays could be excluded from the ten days allowed by statute for the filing in this court of an application for writ of error to the municipal court. In holding that such days were not excluded, this court said:

As early as *St. Clair v. Conlon*, 12 App. D. C. 161, this court in construing one of its rules said that Sundays and legal holidays could not be excluded from the time within which an act was to be done, since the rule did not provide for it, but that was a dictum. In *Johnson v. Meyers*, 54 Fed. 417, 4 C. C. A. 399, the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said that, where the time limited for the performance of an act is less than seven days, where the unit of its measurement is a day, and there is no reason to suppose that juridical days were intended by

a statute or act of Congress, there is reasonable ground for the holding that Sundays and legal holidays falling within such time should be excluded. But where the time is such that one or more Sundays must fall within it, and there is no statute or act excluding any of them, *it is certainly not in the province of the court to extend the time by excluding the last, the first, or any intermediate Sunday or holiday.* This decision has been followed by several Circuit Courts of Appeals. *Blaffer v. New Orleans Water Supply Co.*, 160 Fed. 389, 87 C. C. A. 341; *Meyer v. Hot Springs Imp. Co.*, 169 Fed. 628, 95 C. C. A. 156; *Siegelschiffer v. Penn Mutual Life Insurance Co.*, 248 Fed. 226, 160 C. C. A. 304; and *Maresca et al. v. United States* (C. C. A.), 277 Fed. 727, a criminal case.

In the Maresca Case the question was as to whether the *bill of exceptions* was signed and filed in time. *The last day on which this might have been done was a holiday.* If that day was excluded the signing and filing were in time. The Circuit Court of Appeals, Second Circuit, went into the question quite fully, and held that since the statute did not provide for the exclusion of the holiday it must be counted, and that in consequence the bill of exceptions must be disregarded. An application to the Supreme Court of the United States for a writ of certiorari was denied January 3, 1922. 257 U. S. 657, 42 Sup. Ct. 183, 66 L. Ed. 201, advance sheets. *We find no federal author-*

ity in conflict with this rule. Even in the states it seems to be generally settled that when the time stipulated must necessarily include one or more Sundays, those days will be included in the absence of an express proviso for their exclusion. 26 R. C. L. 751. The authorities proceed upon the theory that since the Legislature did not provide for the elimination of Sundays and holidays in calculating the time within which an act should be done the courts have no power to disregard them.

(2) Counsel for the plaintiff in error points to the rules of the municipal court and to a rule of this court which provide expressly for the exclusion of Sundays and holidays in calculating time provided for by them, as authority for his position, but these rules apply only where the statute is silent. *Where the statute provides, as here, that the act must be done within a certain number of days no rule of court could enlarge the time.* True, both the municipal court and this court are authorized to make rules relating to practice, but they must not be in conflict with any statute. This is elementary. 7 R. C. L. sec. 51, p. 1024. [Italics supplied.]

The following cases support the rule that where the last day of the statutory period for the doing of an act falls on Sunday, the doing of the act on the following Monday comes too late:

Shafer v. Magone (C. C.) 47 Fed. 872 (Protest to Collector against levying of duties on imports).

Johnson v. Meyers (C. C. A. 8th Cir.) 54 Fed. 417 (Appeal).

Meyer v. Hot Springs Imp. Co. (C. C. A. 9th Cir.) 169 Fed. 628 (Appeal).

Siegelschiffer v. Penn. Mut. Life Ins. Co. (C. C. A. 2nd Cir.) 248 Fed. 226, certiorari denied 246 U. S. 654 (Writ of error).

Maresca v. United States (C. C. A. 2nd Cir.) 277 Fed., 727, certiorari denied, 257 U. S. 657 (Bill of exceptions).

In re Anttonen, (D. C. Ore.) 293 Fed. 473 (Petition for naturalization).

Northwestern Public Service Co. v. Pfeiffer, (C. C. A. 8th Cir.) 36 Fed. (2nd) 5 (Appeal).

Larkin v. Hinderliter Tool Co. (C. C. A. 10th Cir.) 60 Fed. (2nd) 491 (Appeal).

Walters v. B. & O. R. Co. (C. C. A. 3rd Cir.) 76 Fed. (2nd) 599 (Appeal).

Counsel for appellants in their brief rely upon the cases of *Lamson v. Andrews*, 40 App. D. C. 39; *Street v. United States*, 133 U. S. 299, and *Monroe Cattle Company v. Becker*, 147 U. S. 47, which they contend establish a contrary rule. The *Lamson* case did not involve the construction of a statute, but merely the power of the court below to determine the meaning of one of its orders extending the time for settling a bill of exceptions. The difference between that case and this is clearly expressed by the Circuit Court of Appeals of the 9th Circuit in the case of *Meyer v. Hot Springs Im-*

provement Company, 169 Fed. 628, where it was said:

So, in construing rules of court in respect to time for pleading and other matters of mere practice, if the last day fall on Sunday, the whole of the next day is allowed within which to perform the required act. *Anonymous*, 2 Hill (N. Y.) 375, and cases there cited. But while courts may construe their own rules equitably and extend the time therein limited, they have no such power as to statutes, and the decided weight of authority is that when the act is to be done within a time fixed by statute, and the last day thereof falls upon Sunday, that day will not be excluded, unless a different rule for computing the time is also provided by statute.

In the other two cases cited, the court held that, in the statutes there under consideration, the question of time was not vital. All of the authorities relied upon by appellants are analysed and differentiated in the opinion of the court below (R. pp. 37, 38); and nothing need be added to what is there said. In the statute under consideration the limitation of time is vital. This court, in the case of *Shannon & Luchs Construction Company v. Reichelderfer*, 61 App. D. C. 36, said:

But the limitation here is statutory, and relates to proceedings after verdict. Under those circumstances the rule is different.

The objections and exceptions are in the nature of a motion for a new trial, and must be filed within the time limited.

Appellants' objections and exceptions, not having been filed within the time limited by statute, were properly stricken from the record by the court below.

II

Appellants' objections and exceptions not having been filed within time, there is no question before this court for review.

Appellants proceed upon the theory that, although no objections and exceptions were filed within time to the verdict of the condemnation jury, they can, nevertheless, urge in this court the exceptions taken to the rulings of the court during the course of the hearing. In this, we submit, appellants are in error. The filing of objections and exceptions is in the nature of a motion for a new trial. *Shannon and Luchs Construction Company v. Reichelderfer*, 61 App. D. C. 36. We appreciate that, in this jurisdiction, in the ordinary action at law, the filing of a motion for a new trial is not necessary to preserve the exceptions taken at the trial. But in many jurisdictions it is provided, either by statute or by rule of court, that no exception can be urged on appeal which has not been included in a motion for a new trial. 3 Corpus Juris, 960. We submit that this was the intention of Congress with respect to condemnation proceed-

ings. Section 46 of Title 25, Code of 1929, provides in part as follows:

The said court shall hear and determine any objections or exceptions that may be filed to any appraisement of the jury and shall have the power to vacate and set any appraisement aside, in whole or in part, when satisfied that it is unjust or unreasonable, * * *.

Section 47 of the same title of the Code provides as follows:

47. *Payment of award.*—If the appraisement of the jury should not be objected to by the parties interested, it shall be confirmed by the court, or, if the appraisement of the new jury is confirmed by the court, the Commissioners of said District shall pay the amount awarded by the jury out of the appropriation made therefor or deposit the same in the same manner as directed in section 65 of this title, and thereupon the land condemned shall become and be the property of the District. (Mar. 3, 1901, 31 Stat. 1266, c. 854, sec. 488; Mar. 1, 1929, 45 Stat. 1438, c. 439.)

Thus, it will be seen that Congress imposed upon the trial court the mandatory duty of confirming the appraisement in the absence of objections and exceptions thereto, and, upon the confirmation, it became the duty of the Commissioners either to pay the money into court or abandon the proceedings. If the duty of confirming the verdict in such

cases is mandatory in the absence of objections and exceptions, it would hardly seem possible that Congress intended that an appeal should lie from an order of confirmation so entered. So far as we have been able to find this question has never been decided by this court, but it has not passed unnoticed.

In the case of *Winslow v. Baltimore & Ohio Railroad Company*, 28 App. D. C. 126, affirmed 208 U. S. 59, no exceptions were filed to the award of the appraisers for the reason that the appellants were satisfied with the amount awarded them and sought only to review a ruling of the court at the trial to which an exception was taken. In referring to this situation this court said:

3. In taking the present appeal it may be doubted whether the appellants may safely disregard the method prescribed by the statute for reviewing the award of the appraisers in the court below. The conditions imposed by statute must be complied with in order to secure the benefit of the appeal. Lewis, Em. Dom. 2d. ed. sec. 537. Section 658, D. C. Rev. Stat., before quoted, requires that written exceptions should be filed within ten days after the filing of such award.

This court, however, proceeded to a consideration of the case upon the merits, upon which it held against the appellants, but expressly stated that it did "not decide" the question here presented.

In the case of *In Re Condemnation of Property for Parks, etc.*, (Mo.) 263 S. W. 97, the statute there involved provided:

The court may, on its own motion, or may on the motion of the city, or of any party interested in the proceedings, filed within four days after the rendition of the verdict, for good cause set aside the verdict of said jury of freeholders, and thereupon, without further notice, may appoint a new jury of freeholders to make a new appraisement or assessment, and fix a time and place for impaneling such other jury and for a rehearing of the whole matter.

After holding that the procedure set up by this statute was exclusive, the court said:

Aside from the foregoing conclusion as to the exclusiveness of the procedure prescribed, the error assigned is, under our general practice, a matter of exception. While it is true that a timely exception was made to the court's ruling, it was not preserved in the motion for a new trial. Whether this omission is indicative of a purpose to abandon this assignment in the trial court or was inadvertent is immaterial. The error is not so preserved as to entitle it to review on appeal.

We, therefore, submit that appellants, having failed to file objections and exceptions to the verdict of the condemnation jury as required by statute, are without standing in this court.

III

Appellants, if entitled to damages for the future closing of the grade crossing at Michigan Avenue (Bunker Hill Road), are not entitled to such damages in this proceeding

If the court sustains the contention of appellees, advanced in point II of this brief, that since appellants failed to file objections and exceptions to the verdict of the condemnation jury within the time allowed by statute, there is no question presented to this court for review, then no consideration need be given to the assignments of error based upon exceptions taken during the course of the trial.

Appellants, however, proceeding upon the theory that they are entitled to raise these questions on this appeal, assign as error the refusal of the trial justice to permit the jury to consider the damages, if any, appellants might sustain by reason of the future closing of the grade crossing in conformity with the provisions of the Act of 1931.

It will be noted from the plats appearing on pages 15 and 17 of the Record that the new viaduct, as required by law, crosses the tracks of the railroad at a point north of Bunker Hill Road. On the east side of the railroad tracks, Bunker Hill Road is in nowise affected by the improvement, except that under the statute the grade crossing will be closed to traffic upon the completion of the viaduct. On the west side of the railroad tracks the approaches to the viaduct begin in the existing roadway of Michigan Avenue, but a low level road-

way will be left on the south side for the use of the abutting property. Therefore, it will be seen that the closing of the grade crossing is a matter separate and distinct from the condemnation proceeding. Under the Act of 1929, the jury is directed (Sec. 45, Title 25, Code of 1929) to view and examine "the land and premises affected by the condemnation proceeding", and "when the hearing is concluded, the jury or a majority of them, shall return to the court, in writing, their appraisement of the value of the interests of all persons, respectively, in such land." Under this statute the jury is only authorized to determine the value of the lands and premises taken by the condemnation proceeding, together with damages resulting to the remainder of the land from the improvement for which the land is taken, and not to assess damages against the District of Columbia for the future closing of a grade crossing. In other words, the jury was limited to damages in the case resulting from the erection of the viaduct and approaches thereto. If appellants are entitled to any damages for the future closing of the grade crossing, this right must be asserted in an independent proceeding.

This case is similar in principle to *Garfield Memorial Hospital v. Macfarland*, 31 App. D. C. 447, where, in a condemnation proceeding for the extension of a street, it was contended on appeal that no assessments for benefits should have been levied against the Garfield Memorial Hospital for the rea-

son that it was exempt by law from such assessments. The court below held that, inasmuch as the statute directed the jury to assess benefits on the pieces and parcels of land benefited by the extension, there was "no jurisdiction given the District Court thereby to say what lands, if any, are exempt," and that the question of exemption must be disposed of in another proceeding. In sustaining the action of the lower court, this court said:

With this conclusion, we agree. The trial court, sitting as a district court, was limited in its jurisdiction to the consideration of only such matters as were before it under the express terms of the statute. We are of the opinion that the power to pass upon the question of exemptions was not conferred by the statute. It may be suggested that any attempt to enforce this assessment may be met by the appellant in a way which will necessitate the consideration of these matters. However, they are not properly before us at this time.

It will be noted that neither in the order of the Commissioners directing the institution of these proceedings (R. p. 56) nor in the order of the Commissioners approving the plans and profiles of the viaduct and its approaches is any reference made to the closing of the grade crossing. (R. p. 57). Under the statute, the power to close this street to traffic can come into existence only upon the completion of the viaduct.



Here, the jury, under the statute, had only the power to appraise the value of the land taken by the condemnation proceeding and damages to the remainder resulting from the erection of the viaduct and its approaches. There is no authority in the statute for the jury to assess damages against the District for the future closing of the grade crossing. It might well be that, before the time for the closing of the grade crossing has arrived, Congress, by new legislation, may change its mandate that the crossing be closed.

Assuming, for the sake of argument, that the condemnation statute is broad enough in its terms to permit the jury to assess damages against the municipality for the closing of a grade crossing, we submit it is plain from the facts in this case that appellants are entitled to no damages therefor. It is well settled that the abolition of grade crossings lies within the police power of the State.

Great Northern R. Co. v. Minn., 246 U. S. 434;

Chicago, M. & St. P. Ry. v. Minneapolis, 232 U. S. 430;

Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57;

New York & N. E. R. Co. v. Bristol, 151 U. S. 556.

It is equally as well settled that the constitutional inhibition against taking property without due process of law has no application to consequential

injuries resulting from the exercise of the police power.

In the *Bristol case, supra*, the court, in holding that a legislature could require a railroad company to abolish grade crossings at its own expense, said:

It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals.

In this case the closing of the grade crossing will not deprive the respective appellants of access to their lands from the opposite sides of the railroad. This access is furnished by the viaduct for which this condemnation proceeding was instituted. It is true that this means of access may not be as convenient, but that is a consequential injury resulting from the exercise of the police power for which no right to damages will lie.

If this viaduct was to be erected within the lines of the old Bunker Hill Road, thus physically closing the crossing at grade, it could not be contended, in the light of the decision of this court in *Osborne v. District of Columbia*, 63 App. D. C. 277, that an action for damages would lie, though the result to the appellants would be far worse. In the *Osborne* case, the property owner had sued for damages

for the reason that the District of Columbia, pursuant to an Act of Congress, had replaced and reconstructed an existing bridge to carry Monroe Street over the tracks of the Baltimore and Ohio Railroad, the new bridge and its approaches being considerably above the existing grades. In holding that there was no liability on the part of the District, this court said:

The right of the District of Columbia, and its predecessors in the government of the city of Washington, to grade and regrade its streets without liability for consequential damages, is established. *Goszler v. Georgetown*, 6 Wheat. 593, 5 L. Ed. 339; *Smith, to Use of Cushing v. Corporation of Washington*, 20 How. 135, 148, 15 L. Ed. 858; *Sauer v. New York*, 206 U. S. 544, 27 S. Ct. 686, 51 L. Ed. 1176; *District of Columbia v. Atchison*, 31 App. D. C. 260; *Hutcherson v. District of Columbia*, 39 App. D. C. 514.

In *Smith v. Corporation of Washington*, *supra*, the Supreme Court said that changing the grade of a street is neither a trespass upon adjacent property nor the erection of a nuisance injurious thereto, and that "the law on this subject is well settled, both in England and this country. The cases are too numerous for quotation; a reference to one or two more immediately applicable to the questions arising in this case will be sufficient." So in *Callender v. Marsh*, 1 Pick. (Mass.) 418, a street was so dug out as to lay bare the foundation of plaintiff's

house and endanger its fall; in *Green v. Borough of Reading*, 9 Watts (Pa.) 382, 36 Am. Dec. 127, the street in front of plaintiff's house was raised five feet; in *O'Connor v. Mayor, etc., of City of Pittsburgh*, 18 Pa. 187, a street was lowered seventeen feet, necessitating the rebuilding of a church thereon.

In these cases, as in many others the unquestioned inconvenience and expense brought to the plaintiffs by the public improvement was held to be *damnum absque injuria*. And it is not important that the declaration before us, unlike many others in similar cases, alleges the maintenance of a nuisance.

In this case, however, it will be noted from a reading of instructions 10, 12, and 15, given by the court to the jury (R. pp. 21, 22) that the jury was permitted, in awarding damages to appellants, to consider injuries to the remainders of appellants' lands, including injuries resulting from "the change of grade caused by the construction of the viaduct and approaches." We submit that this was all appellants were entitled to.

IV

It is immaterial whether the fee simple title to the old Bunker Hill Road was in the District of Columbia or the abutting property owners

The court below held that, inasmuch as the old Bunker Hill Road was a public highway, it was im-

material in this case whether the fee simple title was in the District of Columbia or the abutting owners. Appellants seem to contend in their brief, though their position is not clear, that if the title were in private ownership they would have a right to damages in excess of that which they would have if the title were in public ownership. They cite no authority to support this contention. It is settled law that the erection over a street of an elevated viaduct is a legitimate street improvement. As was said in *Sauer v. New York*, 206 U. S. 536:

But it may not be inappropriate to say that the decision of the court of appeals seems to be in full accord with the decisions of all other courts in which the same question has arisen. The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement, equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it.

In that case, while the title to the street was in public ownership, such ownership was held, under the statutes of that State, upon a trust that it shall forever be kept open as a public street.

It is equally well settled that it makes no difference, with respect to the rights of the public and the abutting owners whether the street be in public or private ownership.

In *Barney v. Keokuk*, 94 U. S. 324, the court, in sustaining the right of a town to permit railroad tracks to be laid in the street, though the title was in the adjacent property owners, said:

On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent land owner, or in some third person.

And in the case of *Northern Transportation Company v. Chicago*, 99 U. S. 635, the court, in holding that an abutting property owner was not entitled to damages for the construction of a tunnel in the street, said:

It is immaterial whether the fee of the street was in the State or in the City, or in the adjoining lotholders. If in the latter, the State had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

Therefore, it is immaterial to appellants' rights whether the title to Bunker Hill Road be in the abutting property owners or in the District of Columbia.

The appellees were authorized to make provision for low level roadways running along the viaduct

The width of Michigan Avenue, as shown by the Plat (R. p. 15) varies, but Michigan Avenue is a highway planned street, prepared under authority of the Act of Congress of March 2, 1893, as amended (D. C. Code 1929, Title 12, sec. 7 et. seq.). Evidence of conformity of the Plan of the Permanent System of Highways was introduced and received in evidence without objection. (R. p. 63).

To the west of the Metropolitan branch of the Baltimore and Ohio Railway Company, Bunker Hill Road, one of the old original county roads (R. p. 59), merges into Michigan Avenue, where the width in most instances has been increased by formal dedications. Michigan Avenue, west of the railroad tracks, (in which is merged the old Bunker Hill Road,) for its full width shown on the plat (R. p. 15), including the land here condemned, is embraced in the highway plan, although, due to the change of the grade, a portion of it will be at a lower level on the south side. This avenue extends as a highway planned street over the land condemned in this proceeding east of the tracks. No portion of this highway planned street is closed, the result of the treatment being merely a change to an overhead passage along a more northerly route instead of the railroad crossing at grade of the old Bunker Hill Road.

By the Act approved February 28, 1903, entitled "An Act to provide for a Union Railroad Station in the District of Columbia", (D. C. Code of 1929, Title 12, Sec. 123), Congress provided as follows, with reference to highway planned streets:

Any and all streets or highways within the District of Columbia now or hereafter planned or projected to cross any line of steam railroad in the District of Columbia, which may be hereafter opened to public use, shall be located, constructed, and maintained either beneath such railroad by a suitable subway, or above the same by a suitable viaduct bridge at such altitude as will not interfere with the free and safe operation thereof. * * *

Michigan Avenue being a highway planned street, the District Commissioners were authorized by law to condemn all the land necessary to make this street conform with the highway plan. They could not condemn less. *Dougherty v. Galliher*, 58 App. D. C. 166.

Even if Michigan Avenue were not a highway planned street, the Commissioners, we submit, would have authority to condemn all of the land here involved. The Act of February 12, 1931, authorizing the erection of this viaduct, provided (Code of 1929, Supp. 2, Title 12, Sec. 69):

The said Commissioners are further authorized to acquire, out of the appropriations herein authorized, the necessary land to carry out the provisions of this Act, * * *.

The Act does not define the boundaries of the land to be taken. That matter is necessarily left to the judgment and discretion of the Commissioners.

In the case of *Macfarland v. Elverson*, 32 App. D. C. 81, 86, this court said:

When the power to condemn and take property for a public use has been by general statute conferred upon municipal officers by the proper legislative authority, it rests with such officers to determine whether it shall be exercised, and when, and to what extent it shall be exercised. This discretion lies entirely with the local authorities.

See *Briggs v. Brownlow*, 49 App. D. C. 345.

Washington Railway and Electric Co., v. Newman, 41 App. D. C. 439.

There has been no abuse of discretion in this case. Certainly the Commissioners, in acquiring the land they deemed necessary for the construction of the viaduct, had the power to acquire such land in addition to that upon which the viaduct actually rests as is necessary to permit its construction and repair without committing a trespass upon the adjoining land, and to provide low level roadways which will accord access to the abutting properties.

There is no requirement of law that a street for its whole width must be upon the same grade.

In the case of *Willis v. Winona*, 59 Minn. 27, quoted with approval in *Sauer v. New York*, 206 U. S. 536, an elevated viaduct had been erected

in the center of the street leaving low level roadways on each side. In sustaining this action, the court said:

This it has done, in the only way it could have been done, by what, in effect, amounts merely to raising the grade of the center of Maine Street in front of plaintiff's lot. It can make no difference in principle whether this was done by filling up the street solidly, or as in this case, by supporting the way on stone or iron columns. *Neither is it important if the city raised the grade of only a part of the street, leaving the remainder at a lower grade.* [Italics supplied.]

It was clearly intimated by this court in the case of *Hutcherson v. District of Columbia*, 39 App. D. C. 512, that the plan here adopted of leaving low level roadways for the use of the abutting property is the proper practice. In that case the action was brought against the District for damages resulting from the raising of the grade of Eleventh Street to furnish an approach to a new bridge erected over the Anacostia River. There, as here, a low level roadway had been left abutting plaintiff's property. In denying a right to recover, this court said:

Appellant complains, therefore, because 11th Street has been raised opposite his premises, at a distance therefrom of over sixteen feet, notwithstanding that he has practically the same accommodations as heretofore. It is apparent without further

argument, we think, that the injuries complained of are purely consequential. A different case would have been presented had the location of appellant's property been such that the erection of this retaining wall isolated it and prevented its further use. The suggested question is not before us.

VI

The court correctly refused appellant Wimsatt's prayer that the fourteen foot strip on the south side of the viaduct to the east of the railroad cannot be considered as subject to travel or use by adjoining property owners

The trustees of the Wimsatt property requested the court to instruct the jury that it "cannot consider the proposed 14 foot strip on the south side of the viaduct or the open spaces under the viaduct as subject to travel or to use by any adjoining property owner to any extent whatever but must regard the same as in public ownership over which adjoining owners have no control and that they will be trespassers in attempting any use or control over same for any purpose whatever." (R. p. 67.) This instruction the court properly refused. It was apparently based upon the evidence introduced by the appellees that this fourteen foot strip was necessary to be left for purposes of construction and also for access for repairs, inspection and drainage purposes. (R. p. 58). Even though this strip is necessary for these purposes, nevertheless, it is a

part of the public street as shown on the highway plan, and it is impossible to see any theory upon which appellants can contend that the proper use of a public street by the adjoining property owners will constitute a trespass.

CONCLUSION

For the reasons heretofore stated it is respectfully submitted that the action of the court below in ratifying and confirming the verdict of the jury was right and should be affirmed.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1936.

No. 6798.

WILLIAM H. WALKER, ELIZABETH G. HAILER AND
CHARLES W. HAILER, ET AL., *Appellants*,

v.

MELVIN C. HAZEN, GEORGE E. ALLEN AND DANIEL I.
SULTAN, COMMISSIONERS OF THE DISTRICT OF CO-
LUMBIA.

**REPLY BRIEF ON BEHALF OF APPELLANT
WILLIAM H. WALKER.**

WALTER C. CLEPHANE,
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Attorneys for appellant William H. Walker.

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**REPLY BRIEF ON BEHALF OF APPELLANT
WILLIAM H. WALKER.**

Appellees have devoted approximately half of their brief to the propositions that appellant's objections and exceptions after verdict were not filed in time in the court below, that the filing of objections and exceptions is a condition precedent to an appeal, and,

therefore, that there is no question before this court for review.

Regardless of the filing of such objections and exceptions appellant has a right to appeal to this court from the final judgment entered below, because the Code distinctly so provides, as it is believed the references immediately following will demonstrate.

The Applicable Statutes.

At the outset it becomes important to determine under what statutory provisions this condemnation proceeding is before the court. On page 2 of their brief appellees state:

“The specific authority for this improvement is found in the Act of Congress approved February 12, 1931, 46 Stat. L. 1087; D. C. Code of 1929, Supp. 2, Title 12, Sections 67-70.”

Section 69 of Title 12, Supp. 2, D. C. Code of 1929, reads in part:

“The said Commissioners are further authorized to acquire * * * the necessary land to carry out the provisions of sections 67-70 of this title * * * by condemnation in accordance with *sections 51-71*, both inclusive, of title 25 of this Code.” (Italics supplied)

With that as their authority, appellees say, pp. 2-3, of their brief, that they proceeded under D. C. Code, Title 25, *Sections 41-50*.

Referring to the provisions of 41-50 of Title 25, and ignoring the provisions of Sections 51-71, appellees argue that there is no question before the court.

Reference to the Act providing for this project as contained in the Statutes at Large, however, shows that the authority given the Commissioners was to acquire the land needed for the work by condemnation "in accordance with Chapter 15 of the Code of Law of the District of Columbia, as amended" (46 Stat. L. 1087). Chapter 15 of the Code of Law of the District of Columbia, as amended, appears in the Code of the District of Columbia (1929) in Title 25, Chapter 5. Chapter 5 of that Title, *sections 41 to 50 inclusive*, deals with the condemnation of land for the District of Columbia "for sites of schoolhouses, fire or police stations, or for a right of way for sewers, or for any other municipal use authorized by Congress," while *sections 51 to 71, inclusive* are the portions of the Title which deal with the condemnation of land "*to open, extend, or widen any street, avenue, road or highway * * **".

When, therefore, the Commissioners of the District of Columbia desired, as set out in their petition (R. 1, 2), to acquire "land for the Michigan Avenue viaduct and approaches thereto, *including the widening of 10th Street at Michigan Avenue, Northeast, * * **", and also the widening of Michigan Avenue west of the railway right of way, the condemnation proceeding was governed, not as claimed by appellees by Sections 41-50, Title 25, D. C. Code of 1929, which provide for the condemnation of land for "sites for schoolhouses, fire or police stations, or for a right of way for sewers, or for other municipal use authorized by Congress", but by Sections 51 to 71 inclusive (of said Title of D. C. Code of 1929) in which Congress made specific provision for the condemnation of *land for streets*. Section 52 is conclusive on that point for it says:

“52. Condemnation of land for streets.—*Whenever land is needed for the opening, extension, widening, or straightening of any street, avenue, road, or highway in the District of Columbia, authorized by Congress, the Commissioners of the District of Columbia may institute, in the Supreme Court of the District of Columbia, sitting as a district court, by petition, a proceeding in rem for the condemnation of the land needed.*”

There being therefore specific provision for condemnation of land for streets, appellees were required to proceed thereunder, and could not proceed under the provisions of other sections providing for other things.

It is true that in paragraph 2 of the petition filed by the Commissioners in this case they say:

“2. That by the provisions of Chapter XV of the Code of Law for the District of Columbia, as amended by the Act of Congress approved March 1, 1929, entitled ‘An Act to amend Chapter XV of the Code of Law for the District of Columbia and for other purposes,’ the Commissioners of the District of Columbia are authorized, whenever land therein is needed for the sites for schoolhouses, fire or police stations, or for any other municipal use authorized by Congress, and the same cannot be acquired by purchase from the owners thereof at a price satisfactory to the officers of the Government, authorized to negotiate for the same, to make application to the Supreme Court of the District of Columbia for the ascertainment of the value, and the condemnation of the land for the purpose for which it is needed.”

but that is mere surplusage, for Section 53 sets out the required contents of a petition for condemnation of land for streets as follows:

“Such petition shall contain a particular description of the land to be condemned and the names of the owners of the fee of said land and their residences, so far as the same may be ascertained, together with a plan of the land to be taken”, and these requisites were present in appellees’ petition as filed.

Filing Objections and Exceptions is Not Prerequisite to Appeal.

Nowhere in the Sections of the Code dealing with the condemnation of land for streets is there any requirement that before appealing to this court objections and exceptions must be filed and disposed of below. Instead section 64 provides: “Any party aggrieved by any *final order* of the court may appeal therefrom to the Court of Appeals of the District of Columbia * * *.” The final order of the court was entered on March 20, 1936 (R. 41), and it was from that order that this appeal was taken.

In *Shannon & Luchs Construction Co. v. Reichelderfer*, 61 Appeals D. C. 36, this court said: “The objections and exceptions are in the nature of a motion for a new trial.” A motion for a new trial is not, in this jurisdiction, a prerequisite to the right to appeal, and appellees so admit at p. 14 of their brief. The rule in other jurisdictions is therefore immaterial.

Winslow v. Baltimore & Ohio Railroad Co., 28 App. D. C. 126, and *In Re Condemnation of Property for Parks, etc.* (Mo.), 263 S. W. 97 (cited pp. 16 and 17 of appellee’s brief), were both cases where the statute under which the condemnation proceedings were brought provided for a *limited* right of appeal, and both held that the appeal as limited was the only appeal allowable.

It is submitted, therefore, that the appellant, having appealed from "a final order of the court" below, is properly before this court.

The Elimination of the Grade Crossing and the Construction of the Viaduct Constitute a Single Project.

In the course of the trial the court below held that the closing of the Michigan Avenue grade crossing was not involved in this proceeding (R. 59) and, over the objection and exception of appellants, granted the following instruction at the instance of appellees: "The jury should award no damage for the proposed barricade of the grade crossing at Bunker Hill Road and Michigan Avenue, and should award no damage for diversion of traffic, and no damage for the viaduct except insofar as the jury may believe that the change of grade caused by the construction of the viaduct and approaches affects values, or causes damages" (R. 66).

The court also refused to grant the following instructions requested by appellant:

"In determining both damages and benefits the jury shall take into consideration the fact that the purpose of this proceeding is to entirely eliminate any crossing at grade over the tracks of the B. & O. Railroad at Bunker Hill Road or Michigan Avenue" (R. 66).

"In determining both damages and benefits the jury shall take into consideration the fact that Bunker Hill Road or Michigan Avenue is to be barricaded, or closed in some other way, at the grade crossing over the B. & O. Railroad tracks" (R. 66).

"In determining the damages you shall include allowances for such as result from the contem-

plated project, including diversion of traffic and the erection of the viaduct insofar as the completion of the project will cause the same and insofar as such damage results from the change in situations and topographical conditions" (R. 66-67).

Exceptions were duly taken during the trial to all the above rulings.

In their argument pp. 18-24, appellees assume that the construction of the viaduct and the closing of the grade crossing are separate projects entirely disassociated one from the other. That this is not the case abundantly appears from the record.

The very title of the Act: "*An Act to provide for the elimination of the Michigan Avenue grade crossing in the District of Columbia and for other purposes*" (44 Stat. L. 1351, 46 Stat. L. 1087), the authority therein contained "*to construct a viaduct and approaches to eliminate the present crossing at grade of Michigan Avenue and the tracks and right-of-way of the Baltimore & Ohio Railroad Company*", and the mandatory provision "*That from and after the completion of the said viaduct and approaches the highway grade crossing over the tracks and right-of-way of the said Baltimore & Ohio Railroad Company at Michigan Avenue shall be forever closed against further traffic of any kind*",—demonstrate that there is one project, and only one, involved. The order of the District Commissioners passed on June 25, 1935 (R. 56); the order passed by the Commissioners on November 1, 1935 (R. 57) and the treatment plat approved in the last named order (R. 17), all show that the Commissioners so understood it. It was so understood by the Director of Highways when he testified: "Bunker Hill Road will be cut off to conform with the provi-

sions of the Act of Congress. It will be barricaded at the two points indicated" (R. 58). And the Assistant Corporation Counsel so understood it when he stated to the Court, that the plat (D. C. Exhibit #2) (R. 17) showed "the plan that will be put in effect when this land is acquired" (R. 57), and later, "Your Honor will recall, by reading the Act of Congress, that the Act provides for the closing of Bunker Hill Road (R. 59). See also the statement on p. 18 of appellees' brief: "On the east side of the railroad tracks, Bunker Hill Road is in nowise affected by the improvement, *except that under the statute the grade crossing will be closed to traffic upon completion of the viaduct.*"

The thing Congress wishes to accomplish is the closing of the crossing. The construction of the viaduct is only an incidental part of that project. Unless the grade crossing was to be eliminated there would have been no occasion for a viaduct. The former, not the latter, was the purpose and the object of the Act.

In *W. R. E. Co. v. Newman*, 41 App. D. C. 439, 446, Congress had authorized the extension of Q Street, N. W. The project included the construction of a bridge across Rock Creek. There were condemnation proceedings incidental to which benefits were assessed against the property owners. This court in disposing of the case, said:

"It is insisted by defendant that, in assessing benefits, it was improper to take into consideration the proposed construction of the bridge. The bridge will be part of the street when completed; and the jury, in assuming that the bridge would be built, were speculating upon no different contingency than that the street would be graded. Both were within the contemplation of Congress in providing for the present condemnation, and, without

the construction of the bridge, the completion of the contemplated extension of the street would be impossible." So here, the whole project is the closing of the crossing, and it must be assumed that the direction of Congress that "from and after the completion of said viaduct and approaches the highway grade crossing * * * shall be forever closed against further traffic of any kind",

must be then forthwith obeyed. That it will be is evident from the statement quoted above from p. 18 of appellees' brief.

This case has no resemblance whatever to *Garfield Memorial Hospital v. MacFarland*, 31 App. D. C. 447 (cited in appellees' brief at p. 19), because there the District Court had no jurisdiction to determine whether or not any property was exempted from liability for benefits. Here the duty of the jury was to determine the "damages resulting to the remaining land" of appellant "from the improvement for which the land is taken"; and it was and is the elimination of the grade crossing which constitutes that improvement.

Appellant is Entitled to Recover For All the Damage Caused His Remaining Property by the Completed Project.

It may be conceded that under the police power the District of Columbia, in a case where no land of an abutting owner is being taken, may change the grade of a street or close a road without liability for damages, but where, as here, land of the abutting owner is being condemned for the improvement the rule is different.

In *Kost v. State*, 260 N. Y. S. 627, the state appropriated a triangular strip of appellant's land. The State contended there could be no award in excess of the value of the piece of land taken, claiming that all other alleged damages were caused by the change of grade of the highway. The court disagreed with this contention and decided that the decreased adaptability of the property due to taking a portion thereof, and the change in appearance and in the abutting highway, could be considered in assessing the damage.

"This shrinkage of claimant's land", the court said, "has caused the property to be less adaptable as a garage because there is less room in front for that purpose. The appearance of the property has been changed by the taking and claimant's land has been caused to front on a macadam road instead of an asphalt pavement. All of these items, I am satisfied, may properly be considered as items of damage incidental to the taking."

In *Mayor, etc., of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057, a strip of ground 7 feet wide was taken from a parcel of land belonging to the appellee in connection with the widening of a highway and changing its grade. The City argued that damages were not recoverable for an injury to adjacent land caused by a lawful change in the grade of a public highway. The court held that that rule applied only when no part of the abutting property was taken for the purpose of the improvement. And in discussing the damages allowable in such a case the court said:

"upon the theory that the remaining land is in fact primarily injured by the change of street grade accomplished through the condemnation, we

see no reason to restrict the land owner's recovery to less than the amount of the damages actually sustained. The injury in such case to the land not taken consists in the impairment of its availability for convenient and beneficial use with respect to a pre-existing street, and for a loss thus occasioned, as the result of such a proceeding as the present, the owner is entitled to adequate compensation."

See also *Mayor, etc., of Baltimore v. Johnson*, 123 Md. 320, 91 A. 156.

And in *City of Chicago v. Le Moyne*, 119 Fed. 662, where the City of Chicago constructed a viaduct in Halstead Street, Chicago, for the purpose of carrying traffic over railroad tracks crossing said Street, the Circuit Court of Appeals for the Seventh Circuit said:

"The contention that the construction of the viaduct was in the legitimate exercise of the police power of the city, and that any damage to property thereby occasioned is *damnum absque injuria*, notwithstanding the constitutional provision that 'private property shall not be taken or damaged for public use without just compensation', cannot be sustained. The question is set at rest by the recent decision of the Supreme Court of Illinois, in *City of Chicago v. Jackson*, * * * 63 N. E. 1013, holding, with Judge Dillon, that 'a right conferred or protected by the constitution cannot be overthrown or impaired by any authority derived from the police power'."

In the case of *U. S. v. Grizzard*, 219 U. S. 180, 55 L. Ed. 165, the Federal Government had constructed a dam across the Kentucky River. The dam backed water up a tributary and overflowed a strip of Grizzard's land. In addition to the land so taken the court found: "there is taken an easement of access from

plaintiff's land by way of the county road to the Tates Creek pike'', and made allowance therefor.

In discussing the Government's contention that there could be no recovery for cutting off access over a public road to the pike, the court said:

“But here there has been an actual taking by permanently flooding a part of the farm of the defendants in error. An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same. Since, therefore, there has been a taking of a part of the owner's single tract, and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case
* * *

“The damage to the land not appropriated is the obvious consequence of the taking of a part of the whole by flooding,—a manner of appropriating which has made the village market, church and school so inconvenient of access as to add some 3 miles of travel by an unimproved and round about country road. Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing of course, injury due to the use to which the part appropriated is to be devoted.”

And in *Bauman v. Ross*, 167 U. S. 548, 42 L. Ed. 270, 283, the court said:

“The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

“Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.”

Let us, then, consider the situation with regard to the property of this appellant, a part only of which is taken. At the time these proceedings were instituted it had and still has considerable frontage on the right of way of the Baltimore & Ohio Railroad Company. It has a frontage also on Michigan Avenue (R. 15), which is a main traffic artery leading from down town Washington past this property eastward into Brookland and Maryland. Because of these facts it had great commercial value. The changes contemplated, and already being put into effect, as a result of these proceedings, will take it off a wide avenue which is a traffic artery and put it on a narrow 17 foot roadway which will come to a dead end, because of the barricading of the crossing a few yards beyond the east line of the property (R. 17). They will place in front of it, at a distance of 17 feet, a wall approximately 20 feet in height. They will make it necessary for anyone wishing to go eastward from it into Brookland or

Maryland, first to go west and make a sharp turn from the narrow "17 foot low level roadway" onto the viaduct, and for anyone wishing to approach it from the eastward to cross the viaduct going west past the property and make a left hand turn across traffic into the "17 foot low level roadway" above referred to (Plat R. 17), and it will be necessary for one wishing to go from this property to a point just across the railroad track and within a few yards of the property, first to go west to Seventh Street, then east across the viaduct and approaches to Tenth Street and then turn into Bunker Hill Road and come back west to within a few yards of the starting point (Plat R. 17). No more need be said to show that the value of this property (to use the language of the court in *Mayor & City of Baltimore v. Garrett, supra*) has been materially impaired as to "its availability for convenient and beneficial use with respect to a pre-existing street", and that the damage done has resulted not only from the change of grade, but also from placing it upon a "dead end" street, and from narrowing the highway in front of it which is available for its use. Under the authorities above cited it is urged that all of these elements should have entered into the jury's estimate of damages.

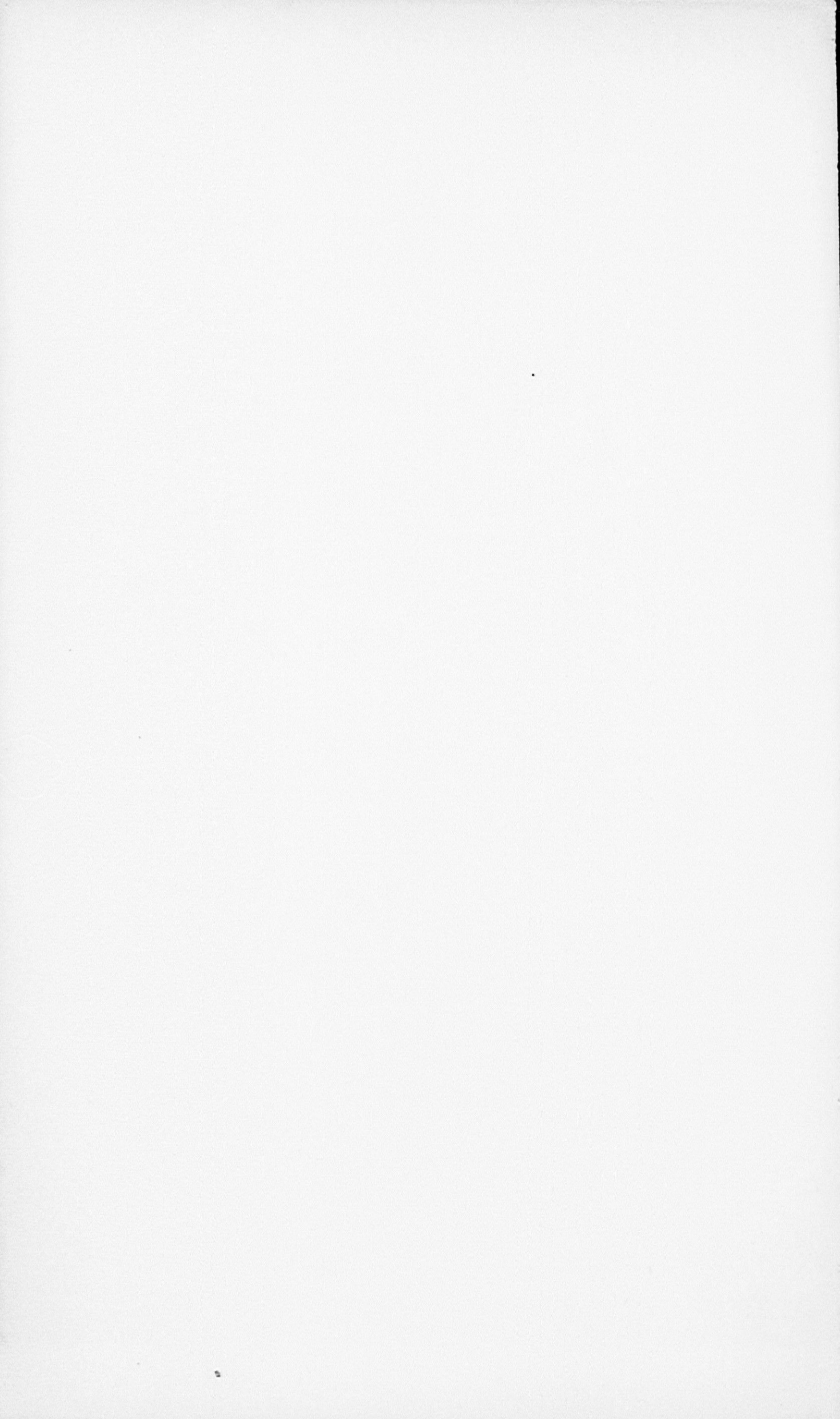
This case is unlike *Osborne v. District of Columbia*, 63 App. D. C. 277 (cited on p. 22 of Appellees' brief), in that while there the grade of a highway had been changed, no property of appellant had been condemned, and the usual rule in such cases was applied by this court.

Appellant respectfully submits (1) that he is properly before the Court, and (2) that the court erred in

its rulings above set out and that, (3) therefore, the judgment below should be reversed.

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Attorneys for appellant William H. Walker.



FILED APR 30 1937

**United States Court of Appeals
for the District of Columbia**

Monroe Burke

CLERK

No. 6798

WILLIAM H. WALKER, ELIZABETH G. HAILER AND
CHARLES W. HAILER, AND WILLIAM K. WIMSATT,
HERMAN M. GRIMES, AND ROBERT C. WIMSATT,
Trustees under the will of WILLIAM A. WIMSATT,
Deceased,

Appellants,

vs.

MELVIN C. HAZEN, GEORGE E. ALLEN, AND DANIEL I.
SULTAN, Commissioners of the District of Colum-
bia,

Appellees.

**MOTION BY APPELLANTS, EXCEPT APPELLANT
WALKER, FOR REHEARING**

FRANK VAN SANT,

*Attorney for Appellants ELIZABETH G. HAILER
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GEORGE E. SULLIVAN,

*Attorney for Appellants, WILLIAM K. WIM-
SATT, HERMAN M. GRIMES, and ROBERT C.
WIMSATT, Trustees under Will of WILLIAM A.
WIMSATT, deceased.*

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**MOTION BY APPELLANTS, EXCEPT APPELLANT
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Come now the appellants, excepting appellant Walker who is filing a separate motion, and respectfully move this Honorable Court for a reconsideration and re-argument of the above case, and vacation of the opinion and judgment of April 19, 1937, upon each of the several and separate grounds hereinafter set forth.

I.

Holding, that Appellants' Objections and Exceptions to Verdict or Appraisement Were Not in Time, is Unwarranted, Because Appellants Complied With What This Honorable Court Had Itself Laid Down in 1913 (24 Years Ago) in Lamson v. Andrews, 40 App. D. C. 39, 41-2; It Not Being Competent for a Court to Reverse Itself on a SETTLED QUESTION OF PRACTICE Without Advance Notice.

In Lamson v. Andrews, 40 App. D. C. 39, 41-2, there was involved a Rule of this Honorable Court (authorized by law and having, therefore, "the force of law"—Weil v. Neary, 278 U. S. 160, 169), which Rule expressly prohibited any extension of time for filing transcript unless made before expiration of previous extension. A previous extension had been limited to expire on Sept. 1, 1912, which happened to be Sunday. The next day, Monday, Sept. 2, 1912, was a legal holiday, Labor Day. In such situation, this Honorable Court held that Tuesday, Sept. 3, 1912, was within time for granting of a further extension, and cited and quoted (among other authorities) from Street v. United States, 133 U. S. 299, 306 (expressly described by this Honorable Court as dealing with "the exercise of a statutory power") as follows:

"It must be noticed that the 1st of January was Sunday, that is, a *dies non*, and a power that may be exercised up to and including a given day of the month may *generally*, when

that day happens to be Sunday, be exercised on the succeeding day."

If this Honorable Court was right in 1913 in making such holding and laying down such general rule, in accord with the aforesaid express pronouncement of the Supreme Court of the United States in 1890 (23 years previously), such general rule ought to be equally right in 1937 (24 years after such holding by this Honorable Court). But, whether right or wrong, such holding directly involved a matter of practice, and it is elementary and fundamental, under the established doctrines of *stare decisis*, that decisions settling questions of practice must be adhered to and respected, and cannot be permitted to be suddenly altered to the prejudice of parties. Vol. 26 A. & E. Enc. Law (2nd Ed.) 163, and cases collected.

The Supreme Court of the United States has well stated, in the early case of *Fullerton et al v. Bank of the United States*, 1 Pet. 604, 614—

"Certainly it would not be supposed that a party pursuing a former mode of proceeding, sanctioned by the most solemn acts of the Court, through the course of eight years, is now to be surprised and turned out of Court, upon a ground which has no bearing upon the merits."

It will be observed that the holding in *Lamson v. Andrews* was actually applied to limitations of time *after* final judgment in the prosecution of a perfected

appeal therefrom, whereas in the case now before this Honorable Court the limitation of time has to do with steps *preceding* final judgment, and therefore coming directly within *the day in Court* to which parties are entitled as of right. It is submitted that *Covey v. Williamson*, 52 App. D. C. 289, cited in the recent opinion of this Honorable Court in this case, is patently inapplicable, as it involved an original petition for writ of error filed 13 days after judgment, when the statute allowed 10 days, as this Honorable Court specifically pointed out in that case.

Moreover, it should not be overlooked that the statute out of which the case now before this Honorable Court arises, and with which this Honorable Court has to deal, is a condemnation statute. Consequently, there is a settled rule of construction which must be regarded, and should be controlling:

“Since statutes prescribing proceedings for the condemnation of property and the assessment of compensation are in derogation of general right and of common-law modes of procedure, they must be strictly *construed in favor of the landowner*.” Vol. 20 Corpus Juris 877, and cases collected.

It should be added that, since the condemnation statute with which we are here so concerned was enacted in 1929, sixteen years after the aforesaid decision in *Lamson v. Andrews*, it is fair to assume that Congress was aware of it and intended the provisions

of said condemnation statute to be construed and interpreted in accord therewith.

II.

Holding That, While a Motion for New Trial or Objections and Exceptions in the Nature Thereof Are Not Necessary in This District, in CASES GENERALLY, to Preserve Points Raised During the Trial, It Is OTHERWISE AS TO CONDEMNATION PROCEEDINGS, VIOLATES the SETTLED RULE that Condemnation Statutes Are to Be Construed IN FAVOR OF THE LANDOWNER.

Section 46 of Title 25 of the D. C. Code, 1929 edition, confers upon the Court power to set aside any appraisement that it may find "unjust or unreasonable," provided that such supervisory authority over the appraisement (or verdict) be invoked by the filing of objections and exceptions "within twenty days after the return of the appraisement." Nothing whatever is stated in the statute about any necessity for such objections and exceptions in order to preserve points of law regularly raised before the Court itself in open Court during the trial and duly excepted to then. It is also significant that, more than five years ago, this Honorable Court denominated such objections and exceptions as being "in the nature of a motion for a new trial." *Shannon & Luchs Construction Co. v. Reichelderfer*, 61 App. D. C. 36, 37. Such a motion has always been optional in this District, depending upon whether a party wishes to invoke the special supervisory authority of the trial Judge

as virtually a 13th, and the dominant, Juror, or wishes to rely wholly upon questions of law raised by exceptions regularly taken during the trial. In fact, this Honorable Court has always treated motions for new trial as so unnecessary and collateral to an appeal, as a general proposition, as to direct their omission from records on appeal. Rule 5 par. 1(d).

To now hold, for the first time in this District, without any clear and explicit language in the statute so requiring, that Congress intended to deprive landowners, *in a condemnation case*, in this District, of their right of appeal as to questions of law raised upon exceptions regularly taken in open Court during the trial before the Court itself, unless they should have directly invoked the supervisory authority of the trial Judge over the verdict or appraisal, or should have taken anew, in such mode, exceptions already preserved in the usual method during the trial, would appear to be not only harsh, and without support in any decided case or legislative provision in this District, but a complete reversal of the settled rule that condemnation statutes are to be construed "in favor of the landowner." Vol. 20 Corpus Juris 877.

It should be added, as shown by the record, that no such holding was made by the Court below, nor even contended for by the appellees in the Court below.

Conclusion.

For each and all of the foregoing reasons, it is submitted that the opinion filed herein April 19, 1937, should be withdrawn, and a rehearing granted.

Respectfully submitted,

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